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A comprehensive compilation of decisions, reports, public notices and other documents of the Federal Communications Commission of the United States.

FEDERAL COMMUNICATIONS COMMISSION

Alfred C. Sikes, Chairman

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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-485

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Bolivar and Nixa, Missouri) RM-7433

NOTICE OF PROPOSED RULE MAKING

Adopted: September 28, 1990; Released: November 5, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration a petition for rule making filed by Sunburst II, Inc. (petitioner), permittee of Station KGBX-FM, Channel 290C2, Bolivar, Missouri, seeking to amend the FM Table of Allotments by changing the community of license of Channel 290C2 from Bolivar to Nixa, Missouri, and to modify its permit accordingly. Petitioner seeks to change its community of license pursuant to Section 1.420(i) of the Commission's Rules. Petitioner filed information in support of its proposal.

2. We believe this proposal warrants consideration because it could provide Nixa, a community of 2,662 persons,[1] with its first local broadcast service. Bolivar (population 5,919) would not be deprived of its only local broadcast service, as AM Station KYOO is licensed to the community. The allotment of Channel 290C2 at Nixa is mutually exclusive with the present facilities at Bolivar because the community separation is less than the required 190 kilometers for Class C2 co-channel allotments. Channel 290C2 could be reallotted to Nixa from Bolivar in compliance with the Commission's minimum distance separation requirements with a site restriction of 29.2 kilometers (18.2 miles) north of the community in order to avoid a short spacing to Station KMCK, Channel 289C1, Siloam Springs, Arkansas, and to a rule making proceeding to upgrade the station at Branson, Missouri, to a Class C3 facility.[2] *See Notice of Proposed Rule Making* (MM Docket No. 89-408), 4 FCC Rcd 6951 (1989).

3. In view of the above, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

	Channel No.	
City	Present	Proposed
Bolivar, Missouri	290C2	---
Nixa, Missouri	---	290C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 27, 1990,** and reply comments on or before **January 11, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Martin R. Leader
Francisco R. Montero
Fisher, Wayland, Cooper and Leader
1255 23rd Street, N.W.
Suite 800
Washington, D.C. 20037-1125
(Counsel for the petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Population figures are taken from the 1980 U.S. Census.

[2] The coordinates for Channel 290C2 and at Nixa are 37-17-10 and 93-10-15.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-484

In the Matter of

Amendment of Section 73.202(b), RM-7478
Table of Allotments,
FM Broadcast Stations.
(Kalispell, Montana)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 28, 1990; Released: November 5, 1990

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed by Skyline Broadcasters, Inc. (petitioner), requesting the allotment of FM Channel 292A to Kalispell, Montana, as that community's fourth broadcast service.[1] Petitioner submitted information in support of the proposal and stated its intention to file an application for the channel.

2. We believe the proposal warrants consideration. Channel 292A can be allotted to Kalispell, Montana, in compliance with the minimum distance separation requirements of the Commission's Rules at the city reference coordinates.[2] Since Kalispell is located within 320 kilometers (200 miles) of the U.S. - Canadian border, we shall request concurrence of the Canadian government for this allotment.

3. In view of the fact that the proposed allotment could provide a fourth FM broadcast service to Kalispell, Montana, the Commission believes it is in the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Kalispell, Montana	246C, 253C, 280C1	246C, 253C, 280C1, 292A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 27, 1990,** and reply comments on or before **January 11, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Ambrose Measuse
Skyline Broadcasters, Inc.
P.O. Box 169
Kalispell, Montana 59903
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits

or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Skyline Broadcasters is the license of AM Station KGEZ, Kalispell, Montana.

[2] The coordinates for Channel 292A are 48-11-42 and 114-18-48.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-483

In the Matter of

Amendment of Section 73.202(b), RM-7456
Table of Allotments,
FM Broadcast Stations.
(Searsport, Maine)

NOTICE OF PROPOSED RULE MAKING

Adopted: September 28, 1990; Released: November 5, 1990

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed by Brian Dodge (petitioner), proposing the allotment of Channel 269A to Searsport, Maine, as that community's first local service. Petitioner filed information in support of the proposed allotment and indicated his intention to file an application for the channel.

2. We believe petitioner's proposal warrants consideration. Channel 269A can be allotted to Searsport, Maine, in compliance with the minimum distance separation requirements of the Commission's Rules without a site restriction.[1] Since Searsport is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence of the Canadian government will be requested for this allotment. The proposal must conform with the technical requirements of Section 73.1030 (c)(1)(5) of the Rules regarding protection to the Commission's monitoring station at Belfast, Maine.

3. In view of the fact that the proposed allotment could provide a first local broadcast service to Searsport, Maine, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Searsport, Maine	---	269A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 27, 1990,** and reply comments on or before **January 11, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Brian Dodge
Harvest Broadcasting Services
RFD 3 Rt.16N
Dover, New Hampshire 03820

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will

be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 269A are 44-27-30 and 68-55-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-482

In the Matter of

Amendment of Section 73.202(b),	RM-7172
Table of Allotments,	
FM Broadcast Stations.	
(Lemoore and Tipton, California)	

NOTICE OF PROPOSED RULE MAKING

Adopted: September 28, 1990; Released: November 5, 1990

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Lemoore Wireless Co., Inc. ("petitioner"), licensee of Station KQYZ(FM), Channel 285A, Lemoore, California, requesting the reallotment of its channel to Tipton, California, as a Class B1 channel, and modification of its license accordingly. Petitioner premises its proposal on the desire to bring a first local broadcast service to Tipton.

2. In support of its proposal, petitioner seeks to invoke the provisions of Section 1.420(i) of the Commission's Rules.[1] In this regard, petitioner asserts that its proposal is mutually exclusive with the present allotment of Channel 285A at Lemoore. The distance between Lemoore and the site suggested by the petitioner at Tipton,[2] is 33.7 kilometers, whereas a distance of 143 kilometers is required by Section 73.207(b) of the Commission's Rules between Class A and B1 co-channels. Petitioner states that its proposal could provide a first local broadcast service to Tipton, and would not deprive Lemoore of local service. Petitioner advises that AM Station KJOP is presently licensed to Lemoore. Additionally, we note that Station KQIQ(AM), currently licensed to the petitioner at Lemoore, has been granted a construction permit (BP-870831AG) which requested, *inter alia*, to change its city of license to Farmersville, California.

3. In further support of its proposal, petitioner advises that Lemoore has a population of 8,832 persons while Tipton has 950 persons. Thus, petitioner asserts, it's proposal would not result in the relocation of a station from a rural area to a much larger urban area. Although petitioner has not identified the source of its population figures, we have confirmed Lemoore's population according to the 1980 U. S. Census. However, Tipton's population is listed slightly higher at 1,185 persons.

4. A staff engineering study confirms that Channel 285B1 can be allotted to Tipton in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules. [3]

5. In light of the above, we shall propose to modify Station KQYZ(FM), to change the community of license and to specify operation on Channel 285B1 at Tipton, California, as requested. In accordance with the provisions of Section 1.420(g) and (i) of the Commission's Rules, we will not accept competing expressions of interest in the use of Channel 285B1 at Tipton.

6. In view of the fact that Tipton, California, could receive its first local broadcast service, we believe it would be in the public interest to seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the communities listed below, as follows:

	Channel No.	
City	Present	Proposed
Lemoore, California	285A	---
Tipton, California	--	285B1

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **December 27, 1990,** and reply comments on or before **January 11, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Lauren A. Colby, Esq.
Law Offices of Lauren A. Colby
10 E. Fourth St.
P.O. Box 113
Frederick, MD 21701

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the

proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] *See Report and Order,* MM Docket No. 88-526, 54 FR 26199, (June 22, 1989); *recon. pend.*

[2] Coordinates specified by the petitioner for a transmitter site at Tipton, California, are 36-02-58 and 119-29-08. Coordinates at the authorized site for Station KQYZ(FM) at Lemoore are 36-16-17 and 119-44-28.

[3] Coordinates used in this determination are those suggested by the petitioner, as indicated, *supra,* which would place the transmitter for Channel 285B1 in an area 15.5 kilometers (9.7 miles) west of Tipton.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-589

In the Matter of

Amendment of Section 73.202(b),	RM-7050
Table of Allotments,	
FM Broadcast Stations.	
(La Crosse, Wisconsin)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 28, 1990; Released: November 5, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 8786 (1989), proposing the substitution of Channel 292C3 for Channel 285A at La Crosse, Wisconsin, and modification of the license for Station WLXR-FM to specify the higher class channel. The *Notice* was issued in response to a petition filed by Vaughn Broadcasting Group (petitioner). On February 20, 1990, petitioner filed comments withdrawing its interest in the proposed channel upgrade at La Crosse, and requesting that the proceeding be terminated. Robert V. Barnes filed comments expressing his support for the channel at La Crosse and indicated he would file an application for the channel.[1]

2. The *Notice* proposed the substitution of FM Channel 292C3 for Channel 285A at La Crosse, Wisconsin, using the present transmitter site of Station WLXR-FM. The *Notice* also proposed the modification of the license for Station WLXR-FM to specify operation on Channel 292C3, indicating if another party expressed interest in the Class C3 allotment, the modification could not be implemented. Since petitioner has withdrawn its interest in Channel 292C3, no further consideration will be given to the substitution of Channel 292C3 for Channel 285A at La Crosse, Wisconsin, or the modification of petitioner's license.

3. We believe the public interest would be served by the allotment of Channel 292C3 to La Crosse, Wisconsin, as that community's fourth FM broadcast service. Channel 292C3 can be allotted to La Crosse, Wisconsin, in compliance with the Commission's minimum distance separation requirements without a site restriction.[2]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 20, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
La Crosse, Wisconsin	227C, 239C2, 285A, 292C3

5. The window period for filing applications for Channel 292C3 at La Crosse will open on **December 21, 1990,** and close on **January 21, 1991.**

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Untimely comments expressing an interest in the channel at La Crosse were filed by Dale A. Ganske.

[2] The coordinates for Channel 292C3 are 43-48-00 and 91-14-42. Because the petition which resulted in this allotment was filed prior to October 2, 1989, applicants may avail themselves of the provisions of Section 73.213(c)(1) of the Commission's Rules. *See* 47 CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-131

In the Matter of

Amendment of Section 73.202(b), RM-7162
Table of Allotments,
FM Broadcast Stations.
(Bowling Green, Missouri)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 25, 1990; Released: November 5, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 5 FCC Rcd 1748 (1990), proposing the substitution of FM Channel 231C3 for Channel 231A at Bowling Green, Missouri, and modification of the license for Station KPCR-FM to specify the new channel.[1] The *Notice* was issued in response to a petition filed by Pike County Broadcasting Co. (petitioner). Petitioner filed comments reaffirming its interest in the channel. No other comments were received.

2. We believe the public interest would be served by substituting Channel 231C3 for Channel 231A at Bowling Green, providing the community with enhanced FM broadcast service. As indicated in the *Notice*, Channel 231C3 can be allotted to Bowling Green, Missouri, consistent with the Commission's spacing requirements at petitioner's specified site.[2] We have authorized a modification of petitioner's license for Station KPCR-FM, Bowling Green, to specify operation on Channel 231C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 20, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Bowling Green, Missouri	231C3

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KPCR-FM, Bowling Green, Missouri, IS MODIFIED to specify operation on Channel 231C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Station KPCR-FM was ordered to move from Channel 265A to Channel 231A in MM Docket 86-103, effective September 5, 1989. *See* 4 FCC Rcd 5645 (1989).

[2] The coordinates for Channel 231C3 are 39-21-57 and 91-10-45.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Del Mar and San Clemente,
California)

MEMORANDUM OPINION AND ORDER

Adopted: October 11, 1990; Released: November 6, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it two Petitions for Reconsideration filed by Craig L. Fox.[1] ("Fox" or "petitioner"), directed to the staff action of October 24, 1989, returning his petitions for rule making, seeking the allotment of FM Channel 258A to Del Mar, California, as that community's first local broadcast service, and the allotment of FM Channel 281A to San Clemente, California, as that community's third local FM broadcast service. The petitions were dismissed based on their noncompliance with the United States-Mexican FM Broadcasting Agreement of 1972[2] ("Mexican Agreement"). No comments in response to the petition were received.

2. A staff engineering analysis of Fox's proposals determined that the requested allotment of Channel 258A at Del Mar is 16 kilometers short-spaced to vacant Channel 259A at Tijuana, Mexico. [3] Likewise, Channel 281A at San Clemente is 4.7 kilometers short-spaced to Station XHBA(FM), Channel 281C, Mexicali, Mexico.[4] Therefore, the proposals are inconsistent with the minimum distance separation requirements specified in Section 73.207(b)(1) and (3) of the Commission's Rules.[5] In acknowledgment of the technicial deficiencies, petitioner requested that the Commission present both proposals to the Mexican government as specially negotiated short-spaced allotments, or alternatively, requested their presentation with power limitations in the direction of Tijuana and Mexicali, respectively, to resolve the short-spacing conflicts.

3. In rejecting Fox's proposals, the Chief, Allocations Branch, advised petitioner that proposals which do not comply with the pertinent requirements of the Commission's Rules and international broadcasting agreements will not be accepted for filing.[6] Moreover, petitioner was informed that the Mexican government is unwilling to consider proposals that do not meet the terms of the Mexican Agreement, and that the Commission has no authority to alter unilaterally the terms of an international treaty, except by replacement with a new Agreement or with notice of termination served through diplomatic channels.[7] Further, the staff letter stated that the public interest would not be served by such actions.

4. In support of the petitions for reconsideration, Fox takes issue with our earlier stated position regarding noncompliance with the Mexican Agreement, and reiterates his belief that the interferring contours which the Del Mar and San Clemente proposals would create in the direction of the Mexican border could be eliminated by employing certain technical procedures.

5. Section 1.429 of the Commission's Rules sets forth the limited provisions under which the Commission will reconsider a rule making action. Reconsideration is warranted only if the petitioner cites error of fact or law, or has presented facts or circumstances which raise substantial or material questions of fact which otherwise warrant Commission review of its prior action. The Commission will not reconsider arguments that have already been considered. *Eagle Broadcasting Co. v. FCC*, 514 F.2d 852 (D.C. Cir. 1975). Fox presented no new arguments with regard to his original proposals which the Commission previously failed to consider. Rather, petitioner has simply repeated the arguments initially advanced in his petitions for rule making. Thus, there is no basis to set aside our earlier action returning Fox's proposals as unacceptable for filing for failure to conform with the Mexican Agreement.

6. In view of the above, IT IS ORDERED, That the petitions for reconsideration filed by Craig L. Fox ARE DENIED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Public Notice of the petitions for reconsideration was given December 14, 1989, Report No. 1803.

[2] 24 UST 1815, TIAS No. 7697.

[3] Coordinates specified by Fox for Channel 258A at Del Mar, California, are 32-56-00 and 117-11-00. Coordinates for Channel 259A at Tijuana, Mexico, are 32-30-33 and 117-01-46.

[4] Coordinates specified by Fox for Channel 281A at San Clemente, California, are 33-26-10 and 117-27-00. Coordinates at the operating site of Station XHBA(FM), Channel 281C, Mexicali, Mexico, are 32-40-00 and 115-27-01.

[5] Minimum distance separation requirements are based on those required prior to October 2, 1989. *See Second Report and Order*, MM Docket No. 88-375, 4 FCC Rcd 6375 (1989).

[6] *See Las Cruces, New Mexico*, 4 FCC Rcd 1450 (1989).

[7] *See 1010 Broadcasting, Inc.*, 59 RR 2d 1124 (1986), and *Kerrville Radio*, 2 FCC Rcd 3441 (1987), *rev. den.* 4 FCC Rcd 5021 (1989); *see also Arizona City, Arizona*, 4 FCC Rcd 5711 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-513

In the Matter of

Amendment of Section 73.202(b),	RM-7388
Table of Allotments,	
FM Broadcast Stations.	
(Campbell, Missouri)	

NOTICE OF PROPOSED RULE MAKING

Adopted: October 11, 1990; Released: November 6, 1990

By the Deputy Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed by Jack G. Hunt (petitioner), requesting the substitution of FM Channel 298C3 for Channel 298A at Campbell, Missouri. Petitioner also requests modification of his construction permit (BPH-890214MD) for Channel 298A, to specify Channel 298C3.

2. We believe petitioner's proposal warrants consideration. Channel 298C3 can be allotted to Campbell, Missouri, in compliance with the minimum distance separation requirements of the Commission's Rules at petitioner's specified site.[1] We shall also propose to modify the construction permit of Jack G. Hunt to specify operation on Channel 298C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. Because the proposed allotment could provide a wide coverage area station for Campbell, Missouri, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Campbell, Missouri	298A	298C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 28, 1990,** and reply comments on or before **January 14, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John R. Wilner
Bryan, Cave, McPheeters & McRoberts
1015 Fifteenth Street, N.W.
Suite 1000
Washington, D.C. 20005
(counsel for the petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment

is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 298C3 are 36-29-42 and 89-51-17.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-512

In the Matter of

Amendment of Section 73.202(b), RM-7435
Table of Allotments,
FM Broadcast Stations.
(Skowhegan and Bar Harbor, Maine)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 10, 1990; Released: November 6, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration a petition for rule making filed by Dark Communications, Inc. (petitioner), seeking the substitution of FM Channel 300C3 for Channel 300A at Skowhegan, Maine. Petitioner also requests modification of its construction permit for Station WHQO, to specify operation on Channel 300C3. Petitioner submitted information in support of the proposal and expressed its intention to apply for the channel.

2. Channel 300C3 can be allotted to Skowhegan, Maine, in compliance with the minimum distance separation requirements, provided vacant Channel 299B[1] is deleted from Bar Harbor, Maine.[2] Petitioner has proposed the substitution of FM Channel 299B1 for Channel 299B at Bar Harbor. Channel 299B1 can be allotted to Bar Harbor without a site restriction. [3] Since Skowhegan and Bar Harbor, Maine, are both located within 320 kilometers (200 miles) of the U.S.- Canadian border, Canadian concurrence will be requested. The proposals for Skowhegan and Bar Harbor must conform with the technical requirements of Section 73.1030(c)(1)-(5) of the rules regarding the Commission's monitoring station at Belfast, Maine. We shall propose to modify the construction permit for Station WHQO to specify operation on Channel 300C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. In order to provide an additional wide coverage area station for Skowhegan, Maine, the Commission proposes to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Skowhegan, Maine	286C, 300A	286C, 300C3
Bar Harbor, Maine	256B1, 299B	256B1, 299B1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 28, 1990,** and reply comments on or before **January 14, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Donald E. Martin
Spencer W. Weisbroth
Donald E. Martin, P.C.
2000 L Street, N.W.
Suite 200
Washington, D.C. 20036
(counsel for the petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Channel 299B was allotted to Bar Harbor, Maine, in MM Docket No. 86-92, and a filing window for the channel was open from April 7, 1987, until May 6, 1987. *See* 2 FCC Rcd 1137 (1987). Tanist Broadcasting Corporation, holder of the construction permit for Channel 299B (BPH-870521MB), which expired in August, 1989, filed a letter with the Commission on April 3, 1990, stating it did not intend to build an FM facility at Bar Harbor. Therefore, a new filing window will be opened for the channel at Bar Harbor upon termination of this proceeding.

[2] The coordinates for Channel 300C3 are 44-42-46 and 69-43-36.

[3] The coordinates for Channel 299B1 are 44-23-12 and 18-12-42.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-511

In the Matter of

Amendment of Section 73.202(b), RM-7500
Table of Allotments,
FM Broadcast Stations.
(Burlington, Iowa)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 9, 1990; Released: November 6, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by John M. Giannettino (petitioner), requesting the allotment of Channel 276C3 to Burlington, Iowa, as the community's third local FM service. Petitioner states that he will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 276C3 to Burlington, Iowa, since an interest has been expressed in providing the community with its third local FM service. Channel 276C3 can be allotted to Burlington in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Burlington, Iowa	228A, 297C1	228A, 276C3, 297C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 28, 1990,** and reply comments on or before **January 14, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John M. Giannettino
P.O. Box 946
Burlington, Iowa 52601
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It

should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 276C3 at Burlington are North Latitude 40-48-36 and West Longitude 91-14-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-510

In the Matter of

Amendment of Section 73.202(b),	RM-7491
Table of Allotments,	RM-7496
FM Broadcast Stations.	
(Taylorville and Virginia,	
Illinois)	

NOTICE OF PROPOSED RULE MAKING

Adopted: October 12, 1990; Released: November 6, 1990

By the Assistant Chief, Policy and Rules Division:

1. Before the Commission for consideration are two separately filed and mutually exclusive petitions for rule making. The first petition, filed by USA Radio Corporation, licensee of Station WTJY(FM), Channel 224A, Taylorville, Illinois, requests the substitution of Channel 224B1 for Channel 224A at Taylorville, Illinois, and the modification of its license to specify the higher class channel (RM-7491). The second petition, filed by Panther Creek Communications ("Panther"), requests the allotment of Channel 223A to Virginia, Illinois, as that community's first local FM broadcast service. The respective proponents stated their intentions to apply for the channels, if allotted.

2. An engineering analysis reveals that Channel 224B1 can be substituted for Channel 224A at Taylorville, Illinois, in compliance with the Commission's minimum distance separation requirements with a site restriction of 13.6 kilometers (8.4 miles) southwest of the community,[1] in order to avoid a short-spacing to a construction permit (BPH-880407MU) for Channel 226A, Decatur, Illinois.

3. Likewise, Channel 223A can be allotted to Virginia, Illinois, in compliance with the Commission's minimum distance separation requirements with a site restriction of 1.1 kilometers (0.7 miles) northwest of the community.[2] The site restriction is necessary in order to avoid a short-spacing to Station WSSU(FM), Channel 220B, Springfield, Illinois, and Station WILF-FM, Channel 222C, St. Louis, Missouri.

4. We believe the public interest would be served by seeking comments on the allotment of Channel 223A to Virginia, Illinois, as the community's first local broadcast service, or the upgrade of Station WTJY(FM) from Channel 224A to Channel 224B1. In this regard, we are providing the proponents with an opportunity to demonstrate why their respective proposals should be preferred. The parties should be guided by the criteria set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). We note that the Virginia proposal is seeking a first local service, while the Taylorville proposal seeks to upgrade an existing facility. We also note that a first local service (priority three) is generally preferred over an upgrade to an existing station (priority four).

5. As requested, we shall propose to modify the license of Station WTJY(FM) to specify operation on Channel 224B1. In accordance with Section 1.420(g) of the Rules, we shall not accept competing expressions of interest in the use of Channel 224B1 at Taylorville or require the proponent to demonstrate the availability of an additional equivalent channel for use by other interested parties.

6. Accordingly, we seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

	Channel No.	
City	Present	Proposed
Taylorville, Illinois	224A	224B1
	or	
Virginia, Illinois	--	223A

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **December 28, 1990,** and reply comments on or before **January 14, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Allan G. Moskowitz
Kaye, Scholer, Fierman,
Hays & Handler
901 15th Street, N.W.
Suite 1100
Washington, D.C. 20005
(Attorney for Panther Creek
Communications)

David D. Oxenford
Matthew P. Zinn
Fisher, Wayland, Cooper
& Leader
1255 23rd Street, N.W.
Suite 800
Washington, D.C. 20037
(Attorneys for USA Radio
Corporation)

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction

of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for Channel 224B1 at Taylorville are North Latitude 39-32-00 and West Longitude 89-27-00.

[2] The coordinates for Channel 223A at Virginia are North Latitude 39-57-30 and West Longitude 90-13-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-509

In the Matter of

Amendment of Section 73.202(b), RM-7360
Table of Allotments,
FM Broadcast Stations.
(Port Henry, New York and Middlebury, Vermont)

NOTICE OF PROPOSED RULE MAKING AND ORDER TO SHOW CAUSE

Adopted: October 13, 1990; Released: November 6, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Pro-Radio, Inc. (petitioner), requesting the substitution of Channel 221C3 for Channel 221A at Port Henry, New York, and the modification of its license for Station WMNM(FM) to specify the higher powered channel. In order to comply with the Commission's minimum distance separation requirements, petitioner further requests that noncommercial educational Channel 210A be substituted for noncommercial educational Channel 219A at Middlebury, Vermont, and that the license of The Presidents and Fellows of Middlebury College ("the College") for Station WRMC-FM be modified to specify the alternate Class A frequency. Petitioner states that it will apply for Channel 221C3 at Port Henry, if allotted, and will reimburse Station WRMC-FM for the costs associated with the channel substitution at Middlebury.

2. Channel 221C3 can be allotted to Port Henry in compliance with the Commission's minimum distance separation requirements with regard to all domestic allotments at Station WMNM(FM)'s presently licensed transmitter site.[1] We recognize that adoption of this proposal would result in a 7 kilometer (4.3 mile) short-spacing to the proposed allotment of Channel 221C1 to Ottawa-Hull, Ontario, Canada. However, we have confirmed that the proposed allotment at Port Henry would not result in any prohibited overlap of the protected contour of the proposed Ottawa-Hull allotment. Therefore, we will request Canadian concurrence in the allotment of Channel 221C3 to Port Henry as a specially negotiated allotment. Channel 210A can be substituted for Channel 219A at Middlebury, Vermont, and can be used at Station WRMC-FM's presently licensed transmitter site, without conflicting with any authorized facility.[2] Channel 210A at Middlebury does, however, conflict with the application of St. Lawrence University for Channel 210C3 at North Creek, New York (BPED-900117MA). We will serve a copy of the *Notice* on St. Lawrence University. Canadian concurrence in this allotment is also required since Middlebury is located within 320 kilometers (200 miles) of the U.S.-Canadian border. Finally, we have confirmed that there will be no overlap of the Port Henry Channel 221C3 1 mV/m contour and the Grade B contour of any Channel 6 TV stations. Petitioner has also demonstrated that Channel 210A at Middlebury will provide adequate protection to the nearby Channel 6 Station WRGB(TV), Schenectady, New York.

3. We believe the public interest would be served by proposing the substitution of Channel 221C3 for Channel 221A at Port Henry, New York, since it could enable Station WMNM(FM) to expand its coverage area. As requested, we also propose to modify petitioner's license to specify operation on the higher powered channel. In accordance with Section 1.420 of the Commission's rules, we will not accept competing expressions of interest in use of Channel 221C3 at Port Henry or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Port Henry, New York	221A	221C3

5. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, The Presidents and Fellows of Middlebury College, licensee of Station WRMC-FM, Middlebury, Vermont, SHALL SHOW CAUSE why its license SHOULD NOT BE MODIFIED to specify operation on Channel 210A as proposed herein instead of the present Channel 219A.

6. Pursuant to Section 1.87 of the Commission's Rules, the College may, not later than **December 28, 1990,** file a written statement showing with particularity why its license should not be modified as proposed in the *Order to Show Cause*. The Commission may call on the College to furnish additional information. If the College raises a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date referred to above, the College will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

7. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice of Proposed Rule Making and Order to Show Cause* to the licensee of Station WRMC-FM and the applicant for Channel 210C3 at North Creek, New York, as follows:

Station WRMC-FM
The Presidents and Fellows of Middlebury College
Old Chapel
Middlebury, Vermont 05753

St. Lawrence University
Romoda Drive
Canton, New York 13617
(BPED-900117MA)

8. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

9. Interested parties may file comments on or before **December 28, 1990,** and reply comments on or before **January 14, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Nathaniel F. Emmons, Esq.
Mark N. Lipp, Esq.
Mullin, Rhyne, Emmons and Topel, P.C.
1000 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20036
(Counsel to petitioner)

10. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See, Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

11. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is

directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for Channel 221C3 at Port Henry are North Latitude 44-01-38 and West Longitude 73-28-54.

[2] The coordinates for Channel 210A at Middlebury are North Latitude 44-00-35 and West Longitude 73-10-45.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-18

In the Matter of

Amendment of Section 73.202(b), RM-7122
Table of Allotments,
FM Broadcast Stations.
(Pine Bluff, Arkansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: September 24, 1990; Released: November 5, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 5 FCC Rcd 633 (1990), issued in response to a petition filed on behalf of Madison Hodges (petitioner), permittee of Station KPBQ-FM, Pine Bluff, Arkansas, proposing the substitution of Channel 267C3 for Channel 267A and the modification of his permit accordingly. Petitioner filed comments in support of the proposal. No other comments were received.

2. As indicated in the *Notice*, Channel 267C3 can be allotted to Pine Bluff, Arkansas, at the petitioner's suggested site, which is 11.9 kilometers (7.4 miles) southeast[1] of the community consistent with the minimum distance separation requirements of the Commission's Rules.

3. In view of the above, we believe the public interest would be served by substituting Channel 267C3 for Channel 267A at Pine Bluff, Arkansas, since it would enable Station KPBQ-FM to expand its coverage area. Therefore, in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying the permit of Station KPBQ-FM to specify operation on Channel 267C3, as requested.[2]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 20, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the community listed below, as follows:

City	Channel No.
Pine Bluff, Arkansas	222C1,235C,[3] 257A,267C3

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the permit issued to Madison Hodges, for Station KPBQ-FM, Pine Bluff, Arkansas, IS MODIFIED effective **December 20, 1990,** to specify operation on Channel 267C3 in lieu of Channel 267A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Coordinates at the petitioner's suggested site for Channel 267C3 at Pine Bluff are 34-08-00 and 91-56-45.

[2] Because this allotment is made as a result of a petition for rule making filed prior to October 2, 1989, the permittee may avail himself of the provisions of Section 73.213(c) of the Commission's Rules. *See* 47 CFR § 73.213(c).

[3] Pending before the Commission is a proposal to reallot Channel 235C to Maumelle, Arkansas, and to modify the license for Station KOLL-FM accordingly. *See* RM-7429.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T COMMUNICATIONS,
Complainant,

v. File No. E-90-04

SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, and SOUTH CENTRAL BELL TELEPHONE AND TELEGRAPH COMPANY
Defendant.

ORDER

Adopted: October 25, 1990; Released: November 5, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On October 3, 1989, AT&T Communications (AT&T) filed the above-captioned complaint alleging that defendants' rates for 1988 were unjust and unreasonable in violation of 47 U.S.C. § 201(b). AT&T maintained defendants had overstated their interstate revenue requirements. On October 24, 1990, the parties filed a joint motion to dismiss the complaint with prejudice. The parties state that all claims in the action have been compromised and settled between the parties, with defendants admitting no liability.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the request for dismissal of the above-captioned complanint IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE & TELEGRAPH CO. File No. I-T-C-90-141

Application for authority to reassign, acquire and operate additional facilities for service between the U.S. and the Kingdom of Saudi Arabia.

ORDER AND AUTHORIZATION

Adopted: October 25, 1990; Released: November 6, 1990

By the Chief, International Facilities Division:

1. The above-captioned application, filed on June 28, 1990 by American Telephone & Telegraph Co. (AT&T), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to reassign, acquire, activate and operate additional cable and connecting facilities for service between the U.S. and the Kingdom of Saudi Arabia (Saudi Arabia). The application was placed on public notice on July 11, 1990. No comments were received. Upon consideration of the application, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-90-141 IS GRANTED, and AT&T is authorized to:

a. activate its previously acquired Indefeasible Right of Use (IRU) interest in 87 voice-grade half-circuits in segments E, F, G and H of the South East Asia-Middle East-Western Europe (SEA-ME-WE) cable system;

b. reassign for service to Saudi Arbia its one-half interest in 87 voice-grade circuits in the TAT-6 cable previously authorized for service to France;

c. lease a one-half interest in and operate necessary connecting facilities between the TAT-6 and SEA-ME-WE cable heads in France; and

d. use said facilities to provide AT&T's regularly authorized services between the U.S. and Saudi Arabia and beyond.

3. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between AT&T and its correspondent in Saudi Arabia, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

4. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELE-FIBERNET CORP. File No. I-T-C-90-155

Application for authority to lease and operate facilities for direct service between the U.S. and Iran.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: October 25, 1990; Released: November 6, 1990

By the Chief, International Facilities Division:

1. The above-captioned application filed on July 23, 1990 by Tele-Fibernet Corp. (TFN) requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to lease and operate satellite and connecting facilities for direct service between the U.S. and Iran. The application was placed on public notice on August 8, 1990. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Iran by TFN.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-90-155 IS GRANTED, and TFN is authorized to:

a. lease from Comsat and operate 12 voice-grade satellite half-circuits between the Etam, West Virginia earth station and an appropriate INTELSAT satellite over the Atlantic Ocean, connecting with similar circuits between the satellite and an earth station in Iran, furnished by TFN's correspondent in Iran;

b. lease from AT&T and operate 12 voice-grade circuits in the Etam, West Virginia earth station;

c. lease and operate 12 voice-grade connecting circuits between the Etam, West Virginia earth station and TFN's Charleston, West Virginia operating center; and

d. use said facilities to provide TFN's regularly authorized services, including switched voice service, between the U.S. and Iran and beyond.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between TFN and its correspondent in Iran, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

6. IT IS FURTHER ORDERED that the appliant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b) (October 1, 1989).

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CONSORTIUM COMMUNICATIONS INTERNATIONAL, INC. File No. I-T-C-90-161

Application for authority to acquire and operate facilities for the provision of telex service between the U.S. and India.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: October 25, 1990; Released: November 6, 1990

By the Chief, International Facilities Division:

1. The above-captioned application filed on August 9, 1990 by Consortium Communications International, Inc. (CCI), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate facilities for direct telex service between the U.S. and India. The application was placed on public notice on August 22, 1990. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct telex service to India by CCI.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-90-161 IS GRANTED and CCI is authorized to:

a. lease and operate up to four telegraph-grade half-circuits in previously authorized IRC bearer circuits between the U.S. and India;

b. lease and operate necessary domestic connecting facilities; and

c. use said facilities to provide direct telex service between the U.S. and India and beyond.

3. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between CCI and its correspondent in India, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

4. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

5. IT IS FURTHER ORDERED that the appliant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b) (October 1, 1989).

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-627

In re Applications of

KELLY BROADCASTING SYSTEM CORPORATION — File No. BRH-881014RF

For Renewal of License of Station
WNIK-FM, Arecibo, Puerto Rico

and

SAN LUIS BROADCASTING, INC. — File No. BPH-890103MC

For a Construction Permit for a New
FM Broadcast Station, Channel 293B1,
Arecibo, Puerto Rico

MEMORANDUM OPINION AND ORDER

Adopted: October 26, 1990; Released: November 7, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL, and ESBENSEN.

1. The Review Board has under consideration an Appeal filed July 31, 1990 (Erratum and Attachments filed August 1, 1990) by San Luis Broadcasting, Inc. (San Luis), pursuant to 47 CFR § 1.302, as well as Oppositions to the Appeal filed August 15, 1990 by Kelly Broadcasting System Corporation (WNIK-FM) and by the Mass Media Bureau, and a Reply filed August 29, 1990 by San Luis. The Appeal stems from a ruling by presiding Administrative Law Judge Edward J. Kuhlmann (ALJ) which (1) rejected for lack of "good cause" a financial amendment filed by San Luis on May 16, 1990 (and an erratum and supplement thereto filed June 4, 1990); (2) dismissed San Luis' application; and (3) granted the competing WNIK-FM renewal application. *Memorandum Opinion and Order*, FCC 90M-1820, released June 27, 1990 (*MO&O*). For the reasons set forth below, the Board denies San Luis' appeal.

BACKGROUND

2. In its application filed on January 3, 1989, San Luis did not certify that it was financially qualified, [1] representing instead that:

> [Its] financial qualifications are being arranged at this time. Its certification of its financial qualification will be submitted as soon as that process has been completed.

More than one year later (on January 31, 1990), with San Luis still having not submitted any showing of its financial qualifications, the Mass Media Bureau designated its application for consolidated hearing, along with WNIK-FM's renewal application captioned above, and it specified a basic financial qualifications issue against San Luis. *Hearing Designation Order*, 5 FCC Rcd 439 (1990).

3. Thereafter, on April 4, 1990, the ALJ held a prehearing conference (attended by San Luis' counsel) at which the following procedural schedule was established:

> April 16, 1990 -- discovery begins
>
> July 9, 1990 -- filing of direct written cases
>
> July 13, 1990 -- notification of witnesses for cross-examination
>
> July 23, 1990 -- hearing begins

Tr. 7-9. After Bureau counsel stressed the difficulties inherent in attempting to initiate discovery against an applicant which had not yet claimed to have developed an adequate financial proposal, the ALJ asked San Luis' counsel when it would be financially qualified. Tr. 14-15. When counsel appeared uncertain, the ALJ elaborated:

> I want you to tell me by tomorrow, in writing, the day on which you will certify your financial qualifications. All right? And we will wait until that day then to begin discovery . . . . It has to be shortly after [April] 16th. I mean if you tell me it is going to be May 15th then you are going to be in big trouble. I am not going to wait that long. I mean, you have had months and months and months and months and months.
>
> And as you know, [WNIK-FM's counsel] thinks that you are never going to be able to show that you are financially qualified. And he doesn't want to waste time . . . . We have got to get off the ground. And from your standpoint, [San Luis counsel], your client doesn't want to go through this hearing if it cannot show its financial qualifications. Why would it want to spend that kind of money? Where is it going to get the money?
>
> * * *
>
> But it seems to to me, on second thought, that there isn't any reason why you can't get the discovery ready and get it going . . . . But let us know tomorrow. Talk to your clients, see what they have to say. They can't be working on it very hard if they don't know.

Tr. 15-16.

4. On the following day (April 5), San Luis' counsel stated in writing that the applicant expected to be able to certify its finances by May 10, 1990. On April 26, 1990 the ALJ denied a petition to enlarge issues against San Luis (filed by WNIK-FM on March 15, 1990), and explained in regard to San Luis' financial qualifications that:

> When San Luis certifies, it will have to file a petition for leave to amend its application. San Luis should include as part of its petition a detai led showing of due diligence. For example, if San Luis sought to obtain financing from various banks, individuals, or entities either before or after filing its application, it should include a specific listing of them with the dates on which those efforts were made. Of course, documents supporting the showing should be attached. In addition, because there is an outstanding financial issue against San Luis, San Luis should accompany its petition for leave to amend with complete documentation for its financial proposal. This should include all documents there were provided to lenders and documents from lenders, estimated costs, including legal expenses, etc., and details about how costs were derived.

Memorandum Opinion and Order, FCC 90M-950, released April 26, 1990.

5. By May 14, 1990, San Luis still had not submitted any financial showing. On that date, WNIK-FM filed motions for continuance of procedural dates and to dismiss the San Luis application, noting that San Luis had apparently notified the ALJ and the other parties by letter (on May 10) that it was still unable to certify to its financial qualifications. *See* WNIK-FM Motion for Continuance, filed May 14, 1990, at 2.

6. On May 16, 1990, San Luis filed a petition for leave to amend to submit its financial certification and financial proposal. In its amendment, San Luis estimated its costs of construction and initial operation at $266,688, based primarily on a March 6, 1990 equipment proposal from S.C.M.S., Inc. It also proposed to raise $626,632 through the "quick sale" of three parcels of land (two located in Puerto Rico, and one in the Dominican Republic) allegedly owned by Pablo Llerandi, the sole principal of San Luis, and his wife and son. [2] In its petition, San Luis claimed to have met the six-point test for "good cause" set forth in *Erwin O'Conner Broadcasting Co.*, 22 FCC 2d 140, 143 (Rev. Bd. 1970), [3] relying on old Commission precedents favoring acceptance of amendments to cure disqualifying defects, *Azalea Corp.*, 31 FCC 2d 561 (1971), and interpreting "due diligence . . . in light of the equities of the case," *see Anax Broadcasting Inc.*, 87 FCC 2d 483, 489 (1981). San Luis generally referred to the May 15, 1990 "Declaration" of Pablo Llerandi, submitted with its petition, which claimed (emphasis added):

> The application of San Luis Broadcasting, Inc., was filed on January 3, 1989. *Efforts began immediately to cause it to be financially qualified.*

The Declaration then chronologically lists the following "efforts":

1. San Luis' consulting engineer obtained an itemized equipment proposal dated January 31, 1989, and a revised proposal on May 19, 1989.

2. San Luis' legal counsel traveled to Puerto Rico for conferences aimed at obtaining financing and/or equipment leasing. These conferences were "inconclusive."

3. On May 19, 1989, San Luis received an equipment lease proposal which counsel deemed insufficient under Commission precedent. Counsel requested additional information from the equipment supplier in June, and again on July 28, 1989.

4. On August 18, 1989, an equipment lease "reasonable assurance" letter was received, but counsel deemed it "legally insufficient."

5. "In the meantime," Llerandi had been actively seeking a bank loan commitment, but the bank's consideration of his request "continued for months and there never has been a firm answer, one way or the other."

6. Following release of the *HDO* (on January 24, 1990), San Luis obtained a revised equipment proposal dated March 6, 1990 and included in San Luis' May 16, 1990 amendment.

7. San Luis continued unsuccessfully to seek a bank financing commitment or credit to secure an equipment lease. On January 29, 1990, counsel had discussions with a potential investor, who in late March or early April decided definitely not to participate. Another potential investor, located in early April, decided in early May not to invest.

Llerandi further claimed:

> There also have been further discussions with a leasing company in Puerto Rico and a proposal has been received from it. However, San Luis's counsel has advised that changes would be necessary in the proposal to meet FCC requirements. San Luis will continue to explore the equipment leasing possibilities.
>
> In the light of the foregoing developments and the undertaking of San Luis to file its financial certification by May 10, 1990, it was concluded in the first week of May that the best course of action would be to demonstrate the saleability and availability of proceeds from the sale of real estate held by the applicant's principal, Pablo M. Llerandi and his wife, Carmen E. Phipps de Llerandi. At the same time, the possibilities of equipment leasing will continue to be pursued.

7. In the ruling under appeal, the ALJ denied San Luis' petition for leave to amend and granted WNIK-FM's motion to dismiss San Luis' application. The ALJ held:

> San Luis has not shown after two filings that it acted diligently. The need for the amendment was, moreover, of its own making; it filed its application without obtaining assurance that it could finance the proposal. While San Luis will not obtain a competitive advantage, the amendment does disrupt the orderly conduct of the hearing. Discovery was to

have been initiated by April 23, 1990 but San Luis had no fixed proposal until June 5, 1990. Forty-two of the 72 days allotted for discovery had been completed. Document requests were considered and depositions taken. At this late date, San Luis has not established any equitable reason for consideration of its very late proposal. The petitions for leave to amend, filed May 16 and June 5, 1990 will be denied and the motion to dismiss filed by Kelly will be granted.

MO&O, at para. 9.

8. San Luis argues that its amendment was accompanied by "good cause" and should have been accepted by the ALJ. Specifically, it claims that the efforts it made to develop its financial proposal, as summarized in the Llerandi "Declaration," demonstrate due diligence. In addition, it claims, contrary to the ALJ's finding, that acceptance of its amendment would not have disrupted the orderly conduct of the hearing.

DISCUSSION

9. We affirm the ALJ's ruling. This case is controlled by our holding in *Edwin A. Bernstein*, 4 FCC Rcd 8420, 8421 (Rev. Bd. 1989), *review denied*, 5 FCC Rcd 2843 (1990), that:

> [A] broadcast applicant must be "ready, willing and able" to meet the Commission's financial requirements, certainly once the hearing has been designated, unless some unanticipated event requires an application amendment. [*Tri-State Communications*, 4 FCC Rcd 8258, 8259 (Rev. Bd. 1989), *recon. denied*, 5 FCC Rcd 534 (Rev. Bd. 1990), *review denied*, FCC 90-347, released October 23, 1990;] *Belo Broadcasting Corp.*, 68 FCC 2d 1313, 1320 (1978). *See also Shoblom Broadcasting, Inc.*, 93 FCC 2d 1027, 1028 (Rev. Bd. 1983), *review denied*, FCC 84-119, released April 2, 1984, *aff'd by judgment sub nom. Royce Int'l Broadcasting Co. v. FCC*, 762 F.2d 138 (D.C. Cir. 1985); *Northampton Media Associates*, 3 FCC Rcd 5164, 5169 (Rev. Bd. 1988), *review denied*, 4 FCC Rcd 5517 (1989); *Pepper Schultz*, 103 FCC 2d 1052, 1056 (Rev. Bd. 1986), *aff'd in pertinent part*, 2 FCC Rcd 1476 (1987) (subsequent history omitted); *Washington's Christian TV Outreach Inc.*, 99 FCC 2d 395, 404-405 (Rev. Bd. 1984) (subsequent history omitted).

In *Bernstein*, we upheld the ALJ's rejection of a financial amendment (and dismissal of the applicant) for lack of "good cause" where, as here, the applicant made no attempt to meet the 30-day period for filing post-designation amendments as a matter of right, pursuant to 47 CFR § 73.3522(b)(2), and remained passive and financially unqualified for nearly six months after hearing designation. Here, the applicant's initial financial amendment came nearly four months after designation, and some 15 months after it filed an application conceding its lack of financial qualifications. The efforts it cites in the Llerandi "Declaration" to demonstrate diligence reveal the opposite. While it may have made some attempts to develop an equipment cost proposal, it is apparent that San Luis made no concerted effort to firm-up a showing of its financial resources. Moreover, its June 4, 1990 amendment was submitted *after* the deposition of its principal, Pablo Llerandi, thus prejudicing the other parties and disrupting the proceeding. Finally, we note that, in its application as originally filed on January 3, 1989, San Luis assured the Commission that its "financial qualifications are being arranged *at this time* " (*see supra* para. 2; emphasis added). That representation appears to have been devoid of substance, because the Llerandi "Declaration" of May 15, 1990 averred that, only *after* the January 3, 1989 filing, "efforts began immediately" to solidify its financial proposal. In other words, acceptance of the San Luis financial proposals would require the addition of a misrepresentation/lack of candor issue against San Luis and Llerandi, causing yet further delay and disruption, thus causing it to fail the "good cause" test. Therefore, we affirm the ALJ's determination not to temporize with San Luis' flawed proposal. *See Bernstein*, 5 FCC Rcd at 2843, citing *Chudy Broadcasting Corp.*, 58 RR 2d 133, 134 n.7 (1985). *See also Tri-State*, FCC 90-347, at n.3. *Cf. Roxanne Givens*, 5 FCC Rcd 5371 (Rev. Bd. 1990).

10. ACCORDINGLY, IT IS ORDERED, That the Appeal filed July 31, 1990 (Erratum, August 1, 1990) by San Luis Broadcasting, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

FOOTNOTES

[1] Prior to the Commission's most recent modification of its application form in *Revision of Form 301*, 4 FCC Rcd 3853 (1989), an applicant was permitted to merely check either "Yes" or "No" as to its financial qualifications. Where "No" was checked, a financial hearing issue was routinely designated against that deficient applicant. *See id.*, at 3868 n.71. While the Commission has since changed its processing guidelines to return as unacceptable for filing those applications which do not contain an affirmative financial certification, id. at 3859, this policy change did not take effect until after San Luis' application was filed.

[2] In a pleading styled "Erratum, Amendment and Supplement to Petition for Leave to Amend," filed on June 4, 1990, San Luis sought to (1) increase its cost estimate by $1,000; (2) submit an alternative equipment lease proposal, dated May 16, 1990, from Utility Tower Company; and (3) decrease its purported funds availability to $546,732 by deleting reliance on a parcel of real estate located in Arecibo. Title to the Arecibo land, it seems, "is clouded by other recorded mortgages and liens." San Luis Erratum, filed June 4, 1990, Amended page 2 to "Financial Plan," at n.1. This is not the first time that assets relied upon by Llerandi to finance a station have been subject to undisclosed indebtedness. *See Llerandi v. FCC*, 863 F.2d 79, 81 & n.1 (D.C. Cir. 1988) (Llerandi unable to comply with agreement to purchase WNIK(AM) and WNIK-FM, Arecibo, whose license renewal Llerandi here challenges).

[3] The six elements of "good cause" are: due diligence; involuntariness; no need to modify or add issues or parties; no disruption to hearing; no unfair prejudice to other parties; and no competitive advantage. 22 FCC 2d at 143.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-68

In the Matter of

Amendment of Section 73.606(b), RM-6382
Table of Allotments
Television Broadcast Stations.
(Clermont and Cocoa, Florida)

MEMORANDUM OPINION AND ORDER
(Proceeding Terminated)

Adopted: September 21, 1990; Released: November 9, 1990

By the Commission:

1. The Commission has before it a Petition for Reconsideration filed by Meredith Corporation ("Meredith"), licensee of television Station WOFL, Channel 35, Orlando, Florida, and an Application for Review filed by Rainbow Broadcasting Company ("Rainbow"), permittee of television Station WRBW, Channel 65, Orlando, Florida, both directed to the *Report and Order* in this proceeding. 4 FCC Rcd 8320 (MM Bur. 1989). The *Report and Order* approved a channel exchange agreement between Brevard Community College ("BCC"), licensee of noncommercial educational television Station WRES, Channel *18, Cocoa, Florida, and Press Television Corporation ("Press"), permittee of commercial television Station WKCF, Channel 68, Clermont, Florida, pursuant to Section 1.420(h) of our Rules, 47 C.F.R. § 1.420(h).[1] Press filed oppositions to both the Petition for Reconsideration and the Application for Review. BCC also filed oppositions to both the Petition for Reconsideration and Application for Review. Meredith filed a reply to the oppositions to its Petition for Reconsideration.[2] For the reasons discussed below, we deny both the Petition for Reconsideration and Application for Review.

BACKGROUND

2. On October 14, 1983, we granted a construction permit to Glorious Church of God in Christ ("Glorious") for a new noncommercial educational television station on Channel *18 in Cocoa, Florida (File No. BPET-820416KH). That construction permit authorized facilities of 5,000 kilowatts visual power at 1,300 feet. On July 3, 1986, we granted an application by Glorious to modify its construction permit to specify reduced facilities of 28.3 kilowatts visual power at 400 feet (File No. BMPET-8606062L). On July 1, 1987, Glorious filed its covering license application (File No. BLET-870701KG). At that time, there was pending an application by Glorious to further modify its facilities to specify a visual power of 1,079 kilowatts at 1,054 feet (File No. BMPET-861105KJ). That application was amended to reflect the visual power of the constructed facilities, which was 26.3 kilowatts at 316 feet. On December 17, 1987, both that modification application (File No. BMPET-861105KJ) and the covering license application (File No. BLET-870701KG) were granted.

3. During this period of time, Glorious entered into several agreements pertaining to the Channel *18 construction permit. First, on April 27, 1986, Glorious executed an agreement with New Visions of Florida Broadcasting, Inc. ("New Visions") which provided New Visions with the option to acquire the Channel *18 construction permit. Subsequently, on December 17, 1986, Glorious executed an "Exclusive Option Agreement" with Press which provided Press with an exclusive option to propose an intraband channel exchange involving Channel *18 and a substitute UHF channel "to be obtained" by Press. On June 4, 1987, New Visions assigned its rights and interests in its option agreement with Glorious to Press.

4. In the agreement of June 4, 1987, between Press and New Visions, Press specifically recognized that it was not qualified to be a permittee of a noncommercial educational television station. For that reason, the agreement included the right of Press to assign the option to a "third party qualified to operate Channel 18 as a noncommercial educational television station without the prior consent of Glorious." In a "Consent to Assignment and Novation Agreement," also dated June 4, 1987, Glorious agreed to the assignment of the option. Pursuant to the option agreement, Press designated BCC as the assignee of the Channel 18 construction permit. This assignment application was filed on November 20, 1987, and granted on January 12, 1988 (File No. BAPET-871120KE). The $300,000 purchase price was provided by Press and the channel exchange agreement remained in force as part of the transaction. Finally, we note that on December 14, 1987, Press acquired the construction permit for Channel 68 at Clermont, Florida, which is approximately 64 miles from Cocoa (File No. BAPCT-871023KI).

5. In response to a BCC and Press joint petition for rule making proposing to exchange the Cocoa and Clermont channels, we issued a *Notice of Proposed Rule Making*, 4 FCC Rcd 2515 (MM Bur. 1989). The *Notice* set forth the public interest benefits of this proposal, referencing the fact that the funds received by BCC would be used to improve the facilities of Station WRES. Specifically, with its existing facilities, Station WRES provides a Grade B service to 161,181 persons in a service area of 1,018 square miles. With the increased facilities made possible by the funds received pursuant to the channel exchange agreement, Station WRES would provide Grade B service to 1,396,543 persons in a service area of 7,029 square miles. The *Notice* also observed that Press would, in turn, be able to operate Channel 18 as a commercial television station at the *de facto* antenna farm near Bithlo, Florida, thereby enabling Station WKCF both to serve Clermont and to compete in the Orlando television market. Meredith and Rainbow filed comments in opposition.

6. The *Report and Order* approved the channel exchange, modified the BCC license for Station WRES, Cocoa, Florida, to specify operation on Channel *68, and modified the Press construction permit for Station WKCF, Clermont, Florida, to specify operation on Channel 18. In doing so, the *Report and Order* rejected arguments advanced by Meredith and Rainbow that BCC could operate Station WRES with increased facilities on Channel 18 and serve a comparable population in a comparable service

area. Both parties had argued that the public interest benefit of financially enabling BCC to construct the improved facilities on Channel 68 was insufficient to warrant approval of the agreement. Meredith and Rainbow had also noted that Press could remain on Channel 68 and still serve Clermont and provide Grade A coverage to Orlando. The *Report and Order* rejected arguments concerning whether Press exercised *de facto* control over Station WRES, and whether the communities of Cocoa and Clermont, which are 64 miles apart, are "in substantially the same market" as required by Section 1.420(h) of the Rules.

MEREDITH PETITION FOR RECONSIDERATION[3]

7. In its Petition for Reconsideration, Meredith contends that the staff *Report and Order* was in contravention of *Intraband Television Channel Exchanges* in that the *Order* failed to demonstrate that public interest benefits will result from the exchange of channels. Meredith also notes that neither station is in operation and both stations are authorized with minimal facilities.[4] There is no Commission technical requirement that would constrain either station from operating with maximum facilities on their originally authorized channels, thereby achieving the service gains referred to in the *Report and Order*. In a related context, Meredith argues that Press "controlled" the Station WRES construction permit, and, as a consequence, BCC was not able to determine whether the channel exchange agreement, permitting it to be assigned to the upper end of the UHF band, was in the best interest of Station WRES. In regard to the activities of Press concerning Station WRES and the Channel *18 construction permit, Meredith contends that it has presented a substantial and material question of fact requiring a hearing to determine whether Press had assumed *de facto* control of Station WRES in contravention of Section 310(d) of the Communications Act.[5] In a separate vein, Meredith argues that the 64-mile separation between Cocoa and Clermont results in these stations not being "in substantially the same market" as required by Section 1.420(h) of the Rules. Finally, Meredith asserts that Press is not financially able to meet its financial obligation to BCC which is necessary in order for BCC to implement the facilities improvement at Station WRES.

RAINBOW APPLICATION FOR REVIEW[6]

8. In its Application for Review, Rainbow addresses the propriety of the Press involvement with the Channel *18 construction permit. In this connection, Rainbow contends that, since Press "had total financial control over the operation" of Station WRES and had acquired the right to decide the disposition of Channel *18 via the right to designate the assignee, an unauthorized transfer of control has occurred in contravention of Section 310(d) of the Communications Act. Rainbow also contends that the staff misapplied Commission policy with respect to intraband channel exchanges in three different instances. First, the staff did not consider the fact that both stations could have achieved the technical improvements in their respective facilities on their originally authorized channels. Second, BCC was a "captive" of Press and, therefore, not able to make an independent evaluation of the needs of its service area. Third, the 64-mile separation between Cocoa and Clermont precludes a finding that the stations serve "substantially the same market" as required by Section 1.420(h) of the Rules and *Intraband Television Channel Exchanges*.

DISCUSSION

UNAUTHORIZED TRANSFER OF CONTROL

9. Both Rainbow and Meredith contend that there is a substantial and material question of fact regarding a possible unauthorized transfer of control in contravention of Section 310(d) of the Act. We disagree. Press has been involved with Channel 18 in three different aspects. First, Press entered into an agreement with the former permittee of Station WRES looking toward an intraband channel exchange. Such agreements are necessary and contemplated by *Intraband Television Channel Exchanges*, and do not give rise to any issue concerning control of a station. Second, Glorious granted an option to New Visions to acquire Station WRES. That option was assigned by New Visions to Press, and Glorious consented to that assignment. Inasmuch as Press is not eligible to operate a noncommercial educational television station, that agreement specifically provided that Press would assign its rights to a qualified third party. Glorious agreed to cooperate and assist in obtaining Commission approval of a proposed transfer to a third party. Options and related agreements concerning the future ownership or control of a broadcast station do not raise a *prima facie* case that a transfer of control has occurred. Our only requirements pertaining to such agreements are that they be filed in accordance with Section 73.3613 of the Rules, and not be implemented without prior Commission approval. Third, Press provided funds to both Glorious and BCC looking toward an eventual exchange of channels. The channel exchange agreement and the agreement to assign the license to BCC contemplate only financial assistance from Press. In regard to the aspect of the agreement whereby Press could select the third party assignee, we note that Glorious acquiesced to the arrangement and the third party (BCC) was subject to prior Commission approval. Accordingly, this arrangement raises no substantial and material question of fact requiring further inquiry. More important, however, is the fact that, aside from the matters discussed above, there is no allegation that Glorious or BCC surrendered control of Station WRES. After careful review of the record in this proceeding, it appears that the interest of Press in this proceeding has been the exchange of channels and not the exercise of control over Station WRES. Entering into such agreements and instituting a rule making looking toward such a channel exchange are permissible activities by a permittee or licensee and do not raise a question as to an unauthorized transfer of control. Similarly, the fact that Glorious and BCC have received financial assistance from Press pursuant to these agreements does not raise a substantial and material question of fact that either party had surrendered control of Station WRES. *Cf. Southern Texas Public Broadcasting Council*, 85 FCC 2d 713 (1981); *See also Astroline Com. Co. Ltd Partnership v. FCC*, 857 F2d 1556 (D.C. Cir. 1988).

PUBLIC INTEREST BENEFITS OF THE CHANNEL EXCHANGE

10. We believe that the staff action in this proceeding is consistent with the public interest benefits identified in *Intraband Television Channel Exchanges*. As stated earlier, the proceeds from the proposed channel exchange would enable BCC to improve the facilities of Station WRES and thereby significantly enhance its service area. It would also permit Press to relocate Station WKCF to the *de facto* Bithlo antenna farm and expand its service area.[7] Contrary to the assertion by both Meredith and Rainbow, these are sufficient public interest benefits within the ambit of *Intraband Television Channel Exchanges* to justify favorable action. In paragraph 19 of *Intraband Television Channel Exchanges*, we stated that noncommercial educational stations may receive "consideration" that permits them "to improve the quality of their facilities" and "initiate broadcast operations where it would otherwise not be possible." In addition, in paragraph 23 of *Intraband Television Channel Exchanges*, we referred to the public interest goal of "speeding the development of educational television," as well as expediting "enhanced service to certain communities." These public interest goals are being achieved in this proceeding.[8] We recognize that both stations could achieve comparable improvements on their originally assigned channels. However, without the financial assistance to BCC provided under the channel exchange agreement, BCC is unable to improve the Station WRES facilities. With respect to Station WKCF, we believe that it would be in the public interest and the interest of the station to operate at the existing *de facto* Bithlo antenna farm and provide enhanced UHF service to the public.[9]

11. We also believe that BCC acted properly in this proceeding and in the best interest of Station WRES. In this connection, we note our long-standing reluctance to alter noncommercial educational allotments by dereserving a lower UHF channel and substituting a higher UHF channel. *See Houston, Texas*, 50 RR 2d 1420 (MM Bur. 1982); *Ashland, Kentucky*, 55 RR 2d 1435 (MM Bur. 1984). In *Intraband Television Channel Exchanges*, we stated that this policy concerned vacant noncommercial educational television allotments, and was inapplicable in regard to such agreements involving an assigned channel because the noncommercial educational permittee or licensee is a party to the proceeding and can determine whether the channel exchange is in the best interest of the station. In the present situation, we are aware that the $300,000 purchase price paid by BCC to Glorious for the Channel *18 construction permit was provided by Press and, as a result of the channel exchange agreement, BCC will receive approximately $1,440,000 over a two-year period.[10] As required by *Intraband Television Channel Exchanges*, these funds will be used to improve the facilities of Station WRES. The fact that BCC acted in concert with Press and acquired significant financial assistance from Press does not preclude a finding that BCC acted in the best interest of Station WRES. As discussed above, the channel exchange agreement is in the public interest, the interest of Station WRES, and in the interest of the viewing public.

SEPARATION BETWEEN CLERMONT AND COCOA

12. Section 1.420(h) of the Rules requires that stations participating in the channel exchange agreement be "in substantially the same market." We recognize that Cocoa and Clermont are 64 miles apart and are located in different Standard Metropolitan Statistical Areas (SMSAs). *Intraband Television Channel Exchanges* did not set a mileage separation limitation or impose a same SMSA requirement. In paragraph 32 of *Intraband Television Channel Exchanges*, we specifically stated that we did not believe it necessary to limit the area in which the exchange may be perfected. In the present situation, we note that the proposed Station WKCF facility at the Bithlo *de facto* antenna farm will result in city-grade coverage to Cocoa, and upon implementation of the facility improvements at Station WRES in Cocoa, Station WRES will serve a substantial portion of the Station WKCF service area. In view of the overlap of the respective service contours, we conclude that these stations are "in substantially the same market" within the meaning of Section 1.420(h) of the Rules.[11] *See also Memorandum Opinion and Order*, 4 FCC Rcd 8799 (1989), *recon pending*.

13. Accordingly, IT IS ORDERED, That the aforementioned Petition for Reconsideration filed by Meredith Corporation IS DENIED.

14. IT IS FURTHER ORDERED, That the aforementioned Application for Review filed by Rainbow Broadcasting Company IS DENIED.

15. IT IS FURTHER ORDERED, That the "Joint Motion of Brevard Community College and Press Television Corporation for Consolidation and Expedited Consideration" IS GRANTED to the extent indicated above.

16. IT IS FURTHER ORDERED, That the "Joint Motion of Brevard Community College and Press Television Corporation for Declaratory Order or, Alternatively, for Lifting of Automatic Stay of Decision Approving Television Channel Exchange" IS DISMISSED.

17. IT IS FURTHER ORDERED, That the Press Television Corporation motion to return the Application for Review IS DENIED.

18. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Section 1.420(h) permits a noncommercial educational television and a commercial television licensee or permittee to file jointly a petition for rule making to amend the Television Table of Allotments to exchange channels. The channel to be acquired by the noncommercial educational licensee would be reserved for noncommercial educational use (*), and the channel acquired by the commercial licensee would be dereserved. In addition to serving the public interest, these exchanges must be intraband exchanges and the stations must serve "substantially the same market." *See Intraband Television Channel Exchanges*, 59 RR 2d 1455 (1986), *recon denied*, 3 FCC Rcd 2517 (1988).

[2] We also received a "Joint Motion of Brevard Community College and Press Television Corporation for Consolidation and Expedited Consideration" and a "Joint Motion of Brevard Community College and Press Television Corporation for Declaratory Order or, Alternatively, for Lifting of Automatic Stay of Decision Approving Television Channel Exchange." Meredith filed comments directed to these joint motions, and Rainbow filed an opposition. Press and BCC filed a joint reply to the opposition and comments. Finally, Press filed a motion to return the Application for Review, and Rainbow filed an opposition to that motion.

[3] Section 1.104(c) of the Rules states that if one party files a petition for reconsideration and the second party files an application for review, the Commission will withhold action on the application for review until final disposition of the petition for reconsideration. This section must be read in conjunction with Section 1.429(a)(1) of the Rules which permits the staff to refer a petition for reconsideration in a rule making proceeding to the Commission. The staff has done so in this instance. Accordingly, we are granting the "Joint Motion of Brevard Community College and Press Television Corporation for Consolidation and Expedited Consideration" to the extent of considering both the Petition for Reconsideration and Application for Review in this *Memorandum Opinion and Order*.

[4] Commission records indicate that Station WKCF is currently operating pursuant to Special Temporary Authority at an existing tower near Orange, Florida.

[5] Section 310(d) reads, in pertinent part, as follows:

> "(d) No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commisssion and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby."

[6] Section 1.115(f) of the Rules limits the length of an application for review to 25 double-spaced typewritten pages. Press has filed a motion to return the Rainbow Application for Review for exceeding this limit. In this situation, the Application for Review itself is 14 pages. Rainbow has attached copies of an option agreement and an agreement to assign the option. These are materials which were included to factually support the Application for Review and, thus, are not included in the 25-page limitation. *See* Section 1.48(a) of the Rules. For the convenience of the staff, Rainbow also included a copy of its 9-page comments submitted earlier in this proceeding. An engineering statement had been submitted with those comments. Inasmuch as the engineering statement could have been attached to the Application for Review without inclusion in the 25-page limit, we find that the page limit has not been exceeded. As such, the Application for Review complies with Section 1.115(f) of the Rules, and the Press motion to return the Application for Review will be denied.

[7] In its Application for Review, Rainbow states that Press could locate its Station WKCF facilities at an authorized tower (File No. BPCT-850320KR) near Clermont and provide a Grade B signal to a comparable service area. However, in footnote 14 of *Intraband Television Channel Exchanges*, we specifically stated that we will not consider alternate proposals advanced by third parties. Consistent with this policy, we are only evaluating the public interest benefits of the proposal before us. Consideration of alternate proposals would interfere with proposals between parties looking toward a channel exchange and the advancement of specific public interest benefits. In the present situation, considering the alternate proposal for Station WKCF could negate the agreement between Press and BCC and the benefit to Station WRES.

[8] Rainbow also suggested that we revise the *Intraband Television Channel Exchanges* policy "in light of the obvious potential for mischief it affords." As discussed above, what Rainbow refers to as the "manipulation" of authorizations has advanced the public interest. Rainbow has not set forth sufficient factual arguments to suggest a current need to reassess the intraband channel exchange policy. We are not required to reconsider the underlying merits of a rule or policy each time we apply it. *See WITN-TV, Inc. v. FCC*, 894 F. 2d 1521 (D.C. Cir. 1988). We will, however, continue to closely review the conduct of all parties to intraband channel exchange agreements to ensure that they serve their intended purposes. *See Intraband Television Channel Exchanges*, 1461,1462 and 1464a.

[9] No evidence has been submitted that we erred in concluding in the *Report and Order* that the required city-grade coverage would be provided to Clermont from the proposed Bithlo facilities.

[10] In its Petition for Reconsideration, Rainbow questions whether Press is financially qualified to meet its financial commitment to BCC. In support of this allegation, Rainbow refers to a letter of September 29, 1989, by Press to the Commission requesting a ruling as to whether Station WKCF in Clermont may secure territorial program exclusivity against other stations in the Orlando-Daytona Beach-Melbourne-Cocoa television market pursuant to Section 73.658(m) of the Rules. In that letter, Press claimed that Station WKCF "is on the verge of financial failure." We believe that this letter should be read in its entirety, and after doing so, we do not believe that this argument warrants revisiting the public interest determination that was premised on Press funding the improvements in the Station WRES facilities. The letter of September 29, 1989, stated that Station WKCF is being funded by its parent corporation (Asbury Park Press, Inc.) and in the absence of favorable action on its request, "it is likely that the Station will have to cease operation." On December 11, 1989, we granted, in part, the relief requested by Press. *See Memorandum Opinion and Order*, 4 FCC Rcd 8799 (1989), *recon pending*. In view of that action and a January 22, 1990, declaration by the vice president and chief financial officer of Asbury Park Press, Inc. committing funds to Station WKCF and BCC, it is our view that further inquiry is unwarranted.

[11] Section 1.420(f) of the Rules provides that, in rule making proceedings involving the Table of Allotments, the filing of a petition for reconsideration stays the effect of any Order modifying an authorization to specify operation on a different channel pending final action on the petition for reconsideration. In view of our action disposing of the Petition for Reconsideration and Application for Review, the automatic stay provision of Section 1.420(f) is lifted as of the effective date of this *Memorandum Opinion and Order*. As a consequence, we are dismissing as moot the "Joint Motion of Brevard Community College and Press Television Corporation for Declaratory Order or, Alternatively, for Lifting of Automatic Stay of Decision Approving Television Exchange."

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AC Teleconnect Corporation,
Complainant,

v.

New York Telephone Company and Rochester Telephone Corporation,
Defendants.

File No. E-86-104
File No. E-86-105

ORDER

Adopted: October 26, 1990; Released: November 7, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. We have before us a motion for voluntary dismissal filed by the complainant in the above-captioned proceedings, AC Teleconnect Corporation ("ACC"), requesting that we dismiss the complaints with prejudice. We have fully considered ACC's unopposed motion and grant the requested relief.

2. Accordingly, IT IS ORDERED, pursuant to the authority delegated under Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the above-captioned complaints ARE DISMISSED with prejudice and these proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re application of

RADIO TELEPHONE SYSTEMS, INC. File No. 28217-CD-P/L-89

For a construction permit to establish a new paging facility for Station KCC487 to operate on 152.84 MHz in the Public Land Mobile Service at Johnston, Rhode Island

MEMORANDUM OPINION AND ORDER

Adopted: October 30, 1990; Released: November 7, 1990

By the Chief, Mobile Services Division:

I. INTRODUCTION

1. Radio Telephone Systems, Inc. (RTS) filed the captioned application for a new 152.84 MHz base station at Johnston, Rhode Island. American Paging, Inc. (API) filed a petition to deny arguing that the proposed station would cause interference to API's co-channel station at Warwick, Rhode Island. RTS filed an opposition and API filed a reply. For the reasons set forth below, we grant API's petition and dismiss the captioned application.

II. BACKGROUND AND CONTENTIONS

2. On January 15, 1988, API received an authorization to construct a new base station on frequency 152.84 MHz at Johnston, Rhode Island. On January 17, 1989 API timely filed an FCC Form 489 reporting that the station had been constructed with minor modifications.[1] An attached exhibit stated that the station had been relocated from Johnston to Warwick, Rhode Island, that there was no increase in the reliable service area contour and that the change was a minor modification pursuant to Section 22.9(d)(6) of the Commission's rules.

3. On April 21, 1989, RTS filed the captioned application for a 152.84 MHz station at Johnston, Rhode Island. The application notes that API was authorized to construct a co-channel facility at the same location. RTS, however, states that API failed to construct its facility and failed to file a request for extension of time in which to complete construction.[2] RTS states that because API failed to build its facility within twelve months of receiving a permit, API's authorization expired pursuant to Section 22.43(a) of the rules and RTS's application was acceptable for filing.

4. API filed a petition to deny the application. API states that it constructed its 152.84 MHz station at Warwick, Rhode Island and timely filed an FCC Form 489. API further states that RTS's proposed facility would cause interference to API's Warwick station only 8.07 miles away.

5. In opposition, RTS argues that the Warwick station was built without prior Commission authorization and that API is not entitled to interference protection for an unauthorized facility. RTS states that API relocated its station from Johnston, Rhode Island, in Providence County, to Warwick, Rhode Island, in Kent County. RTS argues that relocating a station to a city and county other than that authorized constitutes a major rather than a minor modification and requires the filing of a new FCC Form 401 and prior Commission approval. RTS also argues that regardless of whether there was an increase in reliable service area contour, API substantially altered its technical proposal by changing the antenna location and antenna system. RTS argues that such a change must be considered a major modification.

6. RTS further argues that API has not commenced service on 152.84 MHz at either the Johnston or Warwick sites and that the authorization has therefore expired. RTS states that it monitored the Warwick facility for three hours on June 27, 1989 and detected no paging or station identification signals. RTS further states that it monitored the facility for two and a half hours on July 3, 1989 and detected only station identification signals repeated at approximately twenty minute intervals.

7. In reply, API states that because there has been no increase in the proposed reliable service area contour, its change in station location constitutes a minor modification permissible without prior Commission authorization pursuant to Section 22.9(d)(6) of the rules. API further states that its base station was timely installed on January 13, 1989 and that the station is providing service to customers. API explains that due to technical problems, the station was out of service from May 26, 1989 thru June 27, 1989, but that service was resumed on June 28, 1989.

III. DISCUSSION

8. API acted within its authorization in constructing the Warwick facility. Section 22.9(d)(6) specifically provides that base station modifications are considered minor as long as there is no increase in the reliable service area contour. Minor modifications may be made without prior Commission authorization and require only notification by FCC Form 489. *See* Section 22.9(d) of the rules. It is uncontroverted that API has not increased its station's reliable service area contour, and there is no legal significance to the fact that the relocation was over a county boundary. Moreover, API properly notified the Commission of the changed antenna location by filing an FCC Form 489.

9. We also reject the argument that API has failed to commence service and that its authorization has therefore expired. API states that its station was timely installed and is providing service to customers. API has explained that no paging signals were detected on June 27, 1989, because the station was temporarily out of service. We do not judge this hiatus in operation to constitute a failure to serve. Similarly, the absence of paging signals for two and a half hours on July 3, 1989 is not sufficient to show a failure to commence service, especially in light of the fact that station identification signals were being broadcast at regular intervals throughout that time.

10. We find that API is authorized to operate on 152.84 MHz from its station at Warwick, Rhode Island. We further find that RTS's proposed system would cause electrical interference to API's Warwick station. Because RTS has failed to demonstrate interference free operation as required by Sections 22.15 and 22.100 of the rules, the captioned application is dismissed as unacceptable for filing pursuant to Section 22.20 of the rules.

IV. ORDERING PARAGRAPHS

11. For the foregoing reasons, IT IS ORDERED that the petition to deny filed by American Paging, Inc. IS GRANTED.

12. IT IS FURTHER ORDERED that the captioned application filed by Radio Telephone Systems, Inc., File No. 28217-CD-P/L-89, IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] The January 17, 1989 filing was timely because January 15, 1989 was a Sunday and January 16, 1989 was a federal holiday.

[2] In the application, RTS states that it checked with the owner of API's proposed site in Johnston, Rhode Island and was told that the facility had not been built. Also, RTS believed, incorrectly, that API had not filed an FCC Form 489.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-534

In the Matter of

Amendment of Section 73.202(b), RM-7519
Table of Allotments,
FM Broadcast Stations.
(Mount Olive, Illinois)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 24, 1990; Released: November 13, 1990

By the Assistant Chief, Policy and Rules Division:

1. At the request of Radio Latino (petitioner), the Commission considers herein a petition for rule making proposing the allotment of Channel 287A to Mount Olive, Illinois, as that community's first local FM broadcast service. Petitioner states its intention to apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 287A to Mount Olive, Illinois, as that community's first local FM service. An engineering analysis has determined that Channel 287A can be allotted to Mount Olive in compliance with the Commission's minimum distance separation requirements,[1] provided that the permittee of Station WJLY-FM, Channel 287A at Ramsey, Illinois, relocates to Channel 227A as ordered in MM Docket No. 88-412. *See* 4 FCC Rcd 2501 (1989).

3. In view of the above, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Mount Olive, Illinois	--	287A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 4, 1991,** and reply comments on or before **January 22, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Bradford D. Carey
Marjorie R. Esman
Walker, Bordelon, Hamlin,
Theriot and Hardy
701 South Peters Street
New Orleans, Louisiana 70130
(Counsel for petitioner)

6. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice of Proposed Rule Making* to the permittee of Station WJLY-FM as follows:

Henry J. Voss
S. Fayette Street, RR 2
Ramsey, Illinois 62008

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73. 504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 287A at Mount Olive are North Latitude 39-04-20 and West Longitude 89-43-38.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-522

In the Matter of

Amendment of Section 73.202(b),	RM-7493
Table of Allotments,	RM-7499
FM Broadcast Stations.	
(Douglas, Georgia and	
LaCrosse, Florida	

NOTICE OF PROPOSED RULE MAKING

Adopted: October 22, 1990; Released: November 7, 1990

By the Assistant Chief, Policy and Rules Division:

1. Before the Commission for consideration are two separately filed and mutually exclusive petitions for rule making. The first petition, filed by WDMG, Inc., licensee of Station WDMB(FM), Channel 258C1, Douglas, Georgia, requests the substitution of Channel 258C for Channel 258C1 at Douglas and the modifiction of its license to specify the higher class channel (RM-7493). The second petition, filed by Robert E. Wideman ("Wideman"), requests the allotment of Channel 258A to LaCrosse, Florida, as that community's first local FM transmission service. The respective proponents stated their intentions to apply for the channels, if allotted.

2. An engineering analysis reveals that Channel 258C can be substituted for Channel 258C1 at Douglas, Georgia, in compliance with the Commission's minimum distance separation requirements with a site restriction of 22.2 kilometers (13.8 miles) southeast,[1] to avoid a short-spacing to Station WHTK(FM), Channel 259C, Port Royal, South Carolina. Likewise, Channel 258A can be allotted to LaCrosse, Florida, in compliance with the Commission's minimum distance separation requirements with a site restriction of 12.1 kilometers (7.5 miles) southeast.[2] The site restriction is necessary in order to avoid a short-spacing to Station WQIK(FM), Channel 256C, Jacksonville, Florida, Station WQYK(FM), Channel 258C1, St. Peter, Florida, and Station WDMG(FM), Channel 258C1, Douglas, Georgia.

3. We believe the public interest would be served by seeking comments on the allotment of Channel 258A to LaCrosse, Florida, as that community's first local broadcast service and the proposed upgrade of Station WDMG(FM) from Channel 258C1 to Channel 258C in order to provide Douglas with a wider area FM service. In this regard, we are providing the proponents with an opportunity to demonstrate why their respective proposals should be preferred. The parties should be guided by the criteria set forth in *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88 (1982). The LaCrosse proposal is seeking a first local service, while the Douglas proposal seeks to upgrade an existing facility. We note that a first local service (priority three) is generally preferred over an upgrade to an existing station (priority four).

4. As requested, we shall also propose to modify the license of Station WDMG(FM) to specify operation on Channel 258C. In accordance with Section 1.420(g) of the Rules, we shall not accept competing expressions of interest in use of Channel 258C at Douglas or require the proponent to demonstrate the availability of an additional equivalent channel for use by other interested parties.

5. Accordingly, we seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following communities:

	Channel No.	
City	Present	Proposed
Douglas, Georgia	258C1	258C
	OR	
LaCrosse, Florida	--	258A

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **December 31, 1990,** and reply comments on or before **January 15, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Robert E. Wideman	Chester F. Naumowicz
3015 W. University Ave.	1025 Connecticut Ave, N.W.
Gainesville, FL 32607	Suite 311
(Petitioner for LaCrosse, FL)	Washington, D.C. 20036
	(Attorney for WDMG, Inc.)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission

specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for Channel 258C at Douglas are North Latitude 31-20-15 and West Longitude 82-43-50.

[2] The coordinates for Channel 258A at LaCrosse, Florida, are North Latitude 29-44-57 and West Longitude 82-20-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-523

In the Matter of

Amendment of Section 73.202(b),	RM-7495
Table of Allotments,	
FM Broadcast Stations.	
(Lincoln, Illinois)	

NOTICE OF PROPOSED RULE MAKING

Adopted: October 24, 1990; Released: November 7, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by L & M Broadcasting Co., Inc. ("petitioner"), proposed assignee of Station WESZ(FM), Lincoln, Illinois.[1] Petitioner requests the substitution of Channel 230A for Channel 261A at Lincoln and modification of the license for Station WESZ(FM) to specify operation on Channel 230A.

2. In support of its proposal, petitioner states that Station WESZ(FM) is limited to 3 kW as a result of the Commission's proposal to allot Channel 260A to Bartonville, Illinois, in MM Docket No. 89-331. *See Notice of Proposed Rule Making*, 4 FCC Rcd 6008 (1989). However, by substituting Channel 230A for Channel 261A, Station WESZ will be able to increase its power to 6 kW thereby expanding its coverage area. Petitioner states that it will have to change its transmitter site to operate at 6 kW on Channel 230A.

3. We believe the public interest would be served by consideration of this proposal since it could permit Station WESZ to expand its service area. An engineering analysis reveals that Channel 230A can be allotted to Lincoln in compliance with the Commission's minimum distance separation requirements with a site restriction of 12.9 kilometers (8 miles) southeast[2] of the community in order to avoid a short-spacing to Station WKZW(FM), Channel 227B, Peoria, Illinois.

4. In view of the above, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Lincoln, Illinois	261A	230A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **December 31, 1990,** and reply comments on or before **January 15, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John S. Neely
Miller & Fields, P.C.
P. O. Box 33003
Washington, D.C. 20033
(Counsel for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND

the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Capital Broadcasting, Inc., licensee of Station WESZ(FM), Channel 261A, Lincoln, Illinois, has authorized petitioner to request this substitution for Station WESZ(FM).

[2] The coordinates for Channel 230A at Lincoln are North Latitude 40-02-00 and West Longitude 89-20-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-524

In the Matter of

Amendment of Section 73.202(b), RM-7501
Table of Allotments,
FM Broadcast Stations.
(Sebring, Florida)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 19, 1990; Released: November 7, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by WJCM, Inc. ("petitioner"), licensee of Station WJCM(AM), Sebring, Florida, requesting the allotment of Channel 298A to Sebring, Florida, as that community's second local FM broadcast service. Petitioner states its intention to apply for the channel, if allotted.

2. We believe the public interest would be served by this proposal because it could provide Sebring with a second local FM service. An engineering analysis has determined that Channel 298A can be allotted to Sebring in compliance with the Commission's minimum distance separation requirements with a site restriction of 9.8 kilometers (6.1 miles)[1] southeast of the community. The site restriction is necessary in order to avoid short-spacings to Station WWRM, Channel 297C1, St. Petersburg, Florida, Station WQBA(FM), Channel 298C1, Miami, Florida and Station WJYO(FM), Channel 299C, Mount Dora, Florida.

3. Accordingly, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Sebring, Florida	288A	288A, 298A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 31, 1990,** and reply comments on or before **January 15, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Julian P. Freret
Booth, Freret & Imlay
1920 N Street, N.W.
Suite 150
Washington, D.C. 20036
(Counsel for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment

is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 298A are North Latitude 27-26-13 and West Longitude 81-21-59.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-525

In the Matter of

Amendment of Section 73.202(b), RM-7505
Table of Allotments,
FM Broadcast Stations.
(Creswell, Oregon)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 24, 1990; Released: November 7, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Jed Broadcasting Co. of Oregon, Ltd. ("petitioner"), requesting the substitution of Channel 237C3 for Channel 237A at Creswell, Oregon, and the modification of its license for Station KAVE to specify operation on the higher powered channel. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 237C3 for Channel 237A at Creswell, Oregon, since it could provide the community with a wide coverage area FM service. Channel 237C3 can be allotted to Creswell in compliance with the Commission's minimum distance separation requirements with a site restriction of 0.3 kilometers (0.2 miles) east of the community to accommodate petitioner's desired transmitter site.[1] As requested, we also propose to modify petitioner's license for Station KAVE to specify operation on Channel 237C3. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in Channel 237C3 at Creswell or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Creswell, Oregon	237A	237C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 31, 1990,** and reply comments on or before **January 15, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

David M. Hunsaker, Esq.
Cary S. Tepper, Esq.
Putbrese, Hunsaker & Ruddy
6800 Fleetwood, Suite 100
P.O. Box 539
McLean, Virginia 22101
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 237C3 at Creswell are North Latitude 43-55-09 and West Longitude 123-00-59.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-181

In the Matter of

Amendment of Section 73.202(b), RM-6938
Table of Allotments,
FM Broadcast Stations.
(Pierre, South Dakota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 24, 1990; Released: November 7, 1990

By the Assistant Chief, Policy and Rules Division:

1. By *Notice of Proposed Rule Making*, 4 FCC Rcd 4904 (1989), the Commission, on its own motion, proposed the substitution of Channel 237C3 for Channel 237A at Pierre, South Dakota, and the modification of the license of Sorenson Broadcasting Corporation ("Sorenson") for Station KLXS to specify operation on the higher powered channel. Sorenson filed a counterproposal requesting the allotment of Channel 237C2 instead of Channel 237C3 to Pierre and the modification of its license accordingly.[1] No other comments were received.

2. We believe the public interest would be served by substituting Channel 237C2 for Channel 237A at Pierre, South Dakota, since it could provide the community with a wide coverage area FM service.[2] Channel 237C2 can be allotted to Pierre in compliance with the Commission's minimum distance separation requirements and can be used at the station's licensed site. [3] As proposed, we will also modify Sorenson's license for Station KLXS to specify operation on Chanel 237C2 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 24, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City		Channel No.
Pierre, South Dakota	224A,	237C2

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Sorenson Broadcasting Coporation, for Station KLXS, Pierre, South Dakota, IS MODIFIED to specify operation on Channel 237C2, in lieu of Channel 237A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Public Notice of filing of the counterproposal was given on August 18, 1989, Report No. 1791. After the record closed, Sorenson filed an amendment to its counterproposal requesting the allotment of Channel 237C1 in lieu of Channel 237C2 at Pierre. The amendment constitutes an untimely filed counterproposal because it was filed after the comment period in this proceeding. Therefore, in accordance with Section 1.420(d) of the Commission's Rules, we will not consider the pleading.

[2] The Commission also has before it the request of Robert E. Ingstad to substitute Channel 224C1 for Channel 224A at Pierre and modify his license for Station KGFX-FM to specify the higher powered channel. *See* 5 FCC Rcd 1765 (1990).

[3] The coordinates for Channel 237C2 at Pierre are North Latitude 44-22-15 and West Longitude 100-24-17. Because the petition which resulted in this allotment was filed prior to October 2, 1989, Sorenson may avail itself of the provisions of Section 73.213(c)(1) of the Commission's Rules. *See* 47 C.F.R. §73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-478

In re Applications of

BEE BROADCASTING ASSOCIATES, a Limited Partnership — File No. BLCT-870908KG

For License to Cover Construction Permit of Station KCTZ(TV), Bozeman, MT

BEE BROADCASTING ASSOCIATES, a Limited Partnership (Assignor)

AND

BIG HORN COMMUNICATIONS, INC. (Assignee) — File No. BAPCT-871029KH

For Assignment of Construction Permit

HEARING DESIGNATION ORDER AND NOTICE OF APPARENT LIABILITY

Adopted: October 4, 1990; Released: November 8, 1990

By the Commission:

1. The Commission has before it for consideration: (a) the June 28, 1988, action of the Chief, Mass Media Bureau, granting the above-captioned application of Bee Broadcasting Associates, a Limited Partnership (BBA),[1] for assignment of the construction permit of Station KCTZ(TV), Channel 7, Bozeman, Montana, to Big Horn Communications, Inc. (Big Horn)[2] and denying a petition to deny that application, filed by Karen L. Reier;[3] (b) Reier's August 15, 1988, application for review of that action; (c) the above-captioned application of BBA for a license to cover its construction permit; and (d) related pleadings.

BACKGROUND

2. The underlying construction permit for the station was awarded in January 1983, and the permittee initially had until July 17, 1984, in which to complete construction. BBA's first extension request was denied on August 7, 1984, after the staff concluded that the failure to build was not due to circumstances beyond the permittee's control. Accordingly, the construction permit was cancelled, and the call sign was deleted. On September 17, 1984, BBA filed a petition for reconsideration of that action, in which it stated that the most expeditious means of getting the station operational would be by assignment of the construction permit to Eagle Communications, Inc. (Eagle), a Montana broadcast group already affiliated with major television networks. BBA and Eagle filed an assignment application on November 28, 1984.

3. On January 15, 1986, BBA's construction permit was reinstated after it was determined that the permittee was eligible for an automatic grant of an additional six months to construct, as a result of the Commission's adoption of a new policy with respect to extension applications. *Construction of Broadcast Stations*, 102 F.C.C. 2d 1054 (1985). The Commission set July 15, 1986, as the new date for the completion of construction, and the assignment application to Eagle was accepted for filing. During the pendency of that application, BBA requested a second extension of time to construct the station, which demonstrated that substantial progress had been made in the construction of the station. Before the extension application could be granted, however, the staff denied the proposed assignment of the permit to Eagle.[4] On January 16, 1987, the staff granted BBA's extension application and extended the construction period until July 16, 1987.

4. In February of 1987, Bee informed Thom Curtis, then Vice President of Big Horn's predecessor, KOUS-TV, Inc., that BBA's construction permit had just been extended and that he would be interested in working with Curtis in building the station. In return, Bee offered to sell Curtis 49 percent of Rose's stock. Bee also suggested that KOUS-TV, Inc. lend BBA sufficient funds to build the Bozeman facility. As a result of these discussions, Curtis, acting on behalf of KOUS-TV, Inc., submitted a written proposal to Bee on March 23, 1987, whereby KOUS-TV, Inc. would lend BBA sufficient funds to construct KCTZ(TV) in Bozeman in return for an option to purchase a 100-percent interest in the station after it was built. Additionally, KOUS-TV, Inc., would pay BBA $165,000 plus other consideration. Before Bee agreed to this proposal, Curtis and J. R. Middleton, the Director of Engineering for KOUS-TV, Inc., ascertained the feasibility of having the Bozeman and Hardin stations share programming. First, Curtis contacted ABC network officials about securing a network affiliation for the Bozeman station, as he had done for KOUS-TV in Hardin. Subsequently, in late March 1987, Curtis and Middleton negotiated with equipment suppliers for the purchase of a transmitter and an antenna. No orders were placed and no payments were made until May 1987. Thereafter, Middleton prepared and Curtis reviewed intercity relay applications, whereby programming would originate at KOUS-TV and would be transmitted to Bozeman by way of an intercity relay network.

5. On April 14, 1987, Bee agreed in principle to the March 23 proposal but modified it to the extent that Curtis would acquire a 49-percent interest in Rose and Big Horn would immediately advance $100,000 to BBA for construction of the station.[5] That same day Curtis was named Vice President of Rose, BBA's general partner,[6] and on April 15, the first funds were advanced to BBA by Big Horn for the purchase of the transmitter. On April 23, 1987, Curtis filed four applications for authorization to construct the intercity relay system mentioned above. On April 30, 1987, Curtis informed Bozeman building officials that he intended to purchase a building in Bozeman to be used as a television studio, and he sought conditional use permit for the construction of microwave facilities adjacent to the structure. During May 1987, sev-

eral orders for equipment and services necessary for station construction were placed. Also during May, Curtis arranged for the American Tower Service to inspect the KCTZ(TV) tower to determine its structural integrity. Thereafter, Curtis became Station Manager for Station KCTZ(TV).[7]

6. On May 13, 1987, Karen Reier, a resident of Bozeman and a prospective applicant for the Bozeman channel should it become available, filed a petition requesting the Commission to order BBA to show cause why its construction permit should not be revoked. Reier alleged that Curtis' above-described actions constituted an unauthorized transfer of control of the permit to Curtis. Additionally, she argued that BBA had misrepresented its intentions to build the station and to acquire equipment and that the facilities under construction varied from those authorized. In subsequent pleadings, Reier raised other charges of misrepresentation and lack of candor, including Curtis' failure to indicate when he became a Vice President and director of Rose, as well as manager of the station, and his June 1987 declaration that he was purchasing KCTZ's studio building as a personal investment, when it was actually purchased by him and Big Horn's president, Daniel Coon, on behalf of C & C Properties. Before Reier's petition was acted upon by the Commission, BBA filed another extension request on July 7, 1987, which demonstrated substantial progress in the station's construction and was granted by the staff on July 16, 1987. On the day a public notice was issued reflecting the grant of that application, Reier filed an informal objection to the application.

7. On September 8, 1987, BBA filed an application for a license to cover KCTZ(TV)'s underlying construction permit, in which it stated that the station had begun operating pursuant to program test authority the previous week. Reier opposed BBA's license application as well, arguing that the KCTZ(TV) facilities differed from those authorized. On October 29, 1987, BBA filed an application to assign the KCTZ(TV) construction permit to Big Horn. Reier also opposed that application, arguing again that an unauthorized transfer of control had taken place.

8. The staff consolidated consideration of both of BBA's extension requests, its license and assignment applications, and Reier's petition for an order to show cause. On June 28, 1988, the Mass Media Bureau, acting pursuant to delegated authority, rejected Reier's contentions, concluding that there was "no properly substantiated evidence that Mr. Bee ever abdicated ultimate control of the station or that Curtis ever directly or indirectly controlled the basic operating policies at KCTZ with respect to financial, personnel or programming matters." The staff also found that there was no showing that the permittee made material misrepresentations or was lacking in candor in its submissions to the Commission. Consequently, the staff denied Reier's petition and granted the assignment application.[8]

PLEADINGS OF THE PARTIES

9. In her application for review, Reier argues that the staff erred by failing to follow applicable precedent and by erroneously concluding that an unauthorized transfer of control had not taken place. The staff had cited *Alabama Educational Television Commission*, 33 F.C.C. 2d 495 (1972), and *Southwest Texas Public Broadcasting Council*, 85 F.C.C. 2d 713 (1981), for the proposition that a licensee's use of its employees or agents to carry out its basic policies does not require a finding that control has been surrendered. Reier contends, however, that they are inapposite to the present situation, since neither addressed the question of whether a prospective purchaser had taken premature control of a broadcast station. Moreover, Reier maintains that the staff ignored *Phoenix Broadcasting Co.*, 44 F.C.C. 2d 838 (1973), and *Fine Arts Broadcasting, Inc.*, 57 F.C.C. 2d 108 (1975), where the Commission stated that prospective purchasers will not be permitted to assume managerial positions at stations they are seeking to acquire unless compelling circumstances are shown. Specifically, Reier reiterates the following as indicia of an unauthorized transfer of control of the permittee: (1) KOUS-TV, Inc.'s filing of intercity relay applications for the purpose of transporting program material of KOUS-TV to KCTZ(TV); (2) Curtis' arrangement for a tower company to inspect KCTZ(TV)'s tower; (3) Curtis' inquiries for a network affiliation for the Bozeman facility and ABC's indication that it would look favorably on such an affiliation, if the station would become a satellite of KOUS-TV;[9] (4) Curtis' April 30, 1987, application for a conditional use permit for KCTZ(TV)'s studio; (5) BBA's representation that Curtis had been appointed Vice President of Rose and that he was assisting BBA in acquiring the necesary equipment to complete construction; (6) Big Horn's advance of funds for construction of the Bozeman facility; and (7) Curtis' signature on BBA's check to cover the filing fee for BBA's license application. In addition, Reier continues to argue that BBA, Bee, and Curtis misrepresented their positions to the Commission and were lacking in candor.

10. In opposition, BBA maintains that Reier's contentions are speculative and that she has raised no facts which have not already been considered and rejected by the staff. BBA again contends that there has been no transfer of control of the permittee and that whatever actions that were taken by Curtis were achieved only with Bee's ultimate approval. In support of its position that a transfer of control had not taken place, BBA cited *Syracuse Channel 62, Inc.*, 60 RR 2d 1161 (1986), upon which the staff also relied. BBA states that, in the *Syracuse* case, the permittee, as here, was unable to build the station for a long time and agreed to sell the station's assets, with simultaneous lease-back to the permittee, and extended the lessor an option to purchase the permit. The Commission there found that the mere advance of funds to put the station on the air did not constitute a transfer of control, so long as the permittee retained the right to determine basic policies concerning the operation of the station. BBA claims that the facts of this case are similar to those in *Syracuse* and that it has never relinquished control of KCTZ.

11. Because of apparent inconsistencies in representations made concerning the ownership of Rose, the staff, on December 21, 1988, and April 4, 1989, sent letters to the applicants seeking information as to when Curtis acquired an interest in Rose. Additionally, the staff requested an explanation of the facts and circumstances surrounding the representations made by the applicants and/or Curtis and Bee before the Commission and the Montana District Court with respect to Bee's and Curtis' ownership interests in Rose. In response, Curtis submitted a declaration in which he recounted his involvement with Station KCTZ(TV). Specifically, he asserted that he and Bee signed a letter of intent proposing Curtis' acquisition

of a 49-percent interest in Rose in exchange for his efforts in helping get KCTZ(TV) built. He stated, however, that the actual Memorandum of Sale was not signed until July 28, 1987. In further response to the staff's inquiries, BBA showed that its court statement as to the ownership of Rose was corrected a week after it was made, and, as a result, Reier subsequently withdrew her previous allegation that Bee had made a false representation in court.

DISCUSSION

12. Section 310(d) of the Communications Act of 1934, as amended (47 U.S.C. Section 310(d)) prohibits the transfer of a construction permit or station license without prior Commission consent. We have often recognized that there is no exact formula by which "control" of a broadcast authorization can be determined. In ascertaining whether a transfer of control has occurred, we have traditionally looked beyond the legal title to whether there are any actions reflecting a new entity or individual with the right to determine the basic policies and ultimate control of the station. *See WHDH, Inc.*, 17 F.C.C. 2d 856 (1969), *aff'd sub nom. Greater Boston Television Corp . v. F.C.C.*, 444 F.2d 841 (D.C. Cir. 1970), *cert. denied* 403 U.S. 923 (1971). In most instances, the question of control involves an issue of fact that must be resolved by examining the specific circumstances presented. *See, e.g., Stereo Broadcasters, Inc.*, 55 F.C.C. 2d 819, 821 (1975). Nevertheless, over the years, the Commission has established certain guidelines in this area, including whether control of the station's finances, its personnel, and its programming have shifted to a new entity or individual. While the *sine qua non* of control is the ability of a permittee or licensee to exercise full responsibility over all matters involving the construction and operation of the station, it should be emphasized that certain duties and responsibilities can be delegated to third parties. In fact, we have held that the day-to-day operation of a station by an agent or employee, when guided by policies set by the licensee, is not inconsistent with the Communications Act. *See Alabama Educational Television Commission*, 33 F.C.C. 2d 495, 508 (1972).[10] Although a permittee or licensee may delegate certain functions to others, it may not abdicate ultimate responsibility to determine the manner or means of operating the station. The question before us, therefore, is whether there is a substantial and material question of fact as to whether Bee abdicated this duty.

13. In the instant case, it has been shown that Curtis was involved in virtually every aspect of getting the station built and on the air -- from negotiating with equipment suppliers and the network to arranging with the engineer for the inspection of KCTZ's tower and filing various applications in the name of the permittee. Additionally, Curtis purchased the Bozeman studio building with Coon and arranged for the advance of funds to complete that station's construction. Curtis, a minority stockholder in the prospective purchaser, also became Station Manager. While BBA and Curtis maintain that this was all done with Bee's ultimate approval, and the staff found the applicants' responses to each of the allegations plausible, we believe that, on balance, a substantial and material question of fact has been raised as to whether Curtis' actions, when considered as a whole, amounted to a transfer of control of the permittee. See *Phoenix Broadcasting Co., supra;* and *Fine Arts Broadcasting, Inc., supra.* Thus, a hearing must be held to determine whether grant of BBA's applications would be in the public interest.

14. Nevertheless, we affirm the staff's decision and its analysis with respect to the issue of misrepresentation and lack of candor. In that connection, we reject Reier's allegation that there is a substantial and material question of fact that BBA falsely represented that the "balance of its equipment" was ordered in June 1986. BBA's June 16, 1986, extension application indicates only that it would be ordering the balance of its equipment -- not that it had already been ordered. The fact that BBA's well intentioned plan, at that time, to purchase all new equipment subsequently went awry does not, we believe, raise a substantial and material question of misrepresentation or lack of candor. Bee has explained his decision to utilize used, rather than new, equipment in the construction of KCTZ(TV), and we find that his sworn explanation is not only plausible, but also is unrefuted by Reier. Moreover, we do not find the fact that BBA's construction and/or equipment plans were altered during that period to be uncommon. As to Reier's further allegation that BBA failed to disclose Curtis' present positions of Vice President and General Manager, we find that Curtis' vice presidency in Rose was, in fact, timely reported in BBA's August 26, 1987, ownership report. While the applicants maintain that Curtis was the Station Manager rather than KCTZ's General Manager, neither position is required to be disclosed in connection with the instant applications or the Commission's ownership reporting requirements. Additionally, we find no basis for questioning Curtis' change of mind with respect to the purchase of the studio building. Although it was ultimately purchased by him and Coon on behalf of C&C Properties, Curtis states that his original intent was to buy it as a personal investment. He also has set forth the circumstances surrounding the inclusion of Coon in the purchase, and both he and Coon have attested to their ownership of the property solely for the purpose of a personal investment. In that regard, Reier has raised no particular facts to cast doubt on the credibility of those statements. Based on the sworn statements and other information presently before us, we are unable to find that Reier has raised substantial and material questions of fact regarding misrepresentations or lack of candor with respect to BBA, Bee, or Curtis.

ORDERS

15. Accordingly, IT IS ORDERED, That the application for review filed by Karen L. Reier IS GRANTED to the extent indicated above and IS DENIED in all other respects, and that the staff's grant of the above-captioned assignment application IS RESCINDED.

16. IT IS FURTHER ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the above-captioned applications for license and assignment of construction permit ARE DESIGNATED FOR HEARING before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues:

(a) To determine whether BBA has undergone an unauthorized transfer of control.

(b) To determine, in light of the evidence adduced pursuant to the foregoing issue, whether BBA, Bee, or Curtis possess the requisite qualifications to be or remain a permittee of Station KCTZ(TV).

(c) To determine, in light of the evidence adduced pursuant to the foregoing issues, and pursuant to Section 309(e) of the Communications Act, whether the grant of the captioned applications will serve the public interest, convenience, and necessity.

17. IT IS FURTHER ORDERED, That this document constitutes a Notice of Apparent Liability for a forfeiture for violation of Section 310(d) of the Communications Act of 1934, as amended, and Section 73.1015 of the Commission's Rules. The Commission has determined that in every case designated for hearing for revocation or denial of license applications for alleged violations that also come within the purview of Section 503(b) of the Communications Act of 1934, as amended, it shall, as a matter of course, include this forfeiture notice so as to maintain the fullest range of possible actions. Because the procedure is thus a routine or standard one, we stress that the inclusion of this notice is not to be taken as indicating in any way what the initial or final disposition of the case should be. That judgment is, of course, to be based on the facts of each case.

18. IT IS FURTHER ORDERED, That, petitioner Karen L. Reier is made a party respondent to this proceeding with respect to the above issues.

19. IT IS FURTHER ORDERED, That, Karen L. Reier shall introduce her evidence as to issues (a) and (b), and that the applicants shall then introduce their evidence and have the burden of proof with respect to all issues.

20. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the parties herein shall, pursuant to Section 1.221(c) of the Commission's Rules in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified herein.

21. IT IS FURTHER ORDERED, That, the applicant shall, pursuant to Section 311(a)(2) of the Communications Act and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

22. IT IS FURTHER ORDERED, That, the Secretary shall send copies of this Order, Certified Mail-Return Receipt Requested, to the parties to this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] BBA is a limited partnership whose general partner is Rose Communications, Inc. (Rose). When the construction permit for the channel was first granted, Benny Bee was the President, Chief Executive Officer, and sole shareholder of Rose.

[2] Big Horn is the licensee of Stations KOUS-TV, Hardin, Montana, KYUS-TV, Miles City, Montana, KZMQ and KZMQ-FM, Greybull, Wyoming, and four low power television stations in Montana and Wyoming.

[3] *Bee Broadcasting Associates*, 3 FCC Rcd 4323 (1988).

[4] Eagle had proposed to operate KCTZ as a satellite of its commonly owned Station KECI-TV in Missoula, Montana. The staff concluded, however, that, in light of the significant degree of overlap between the two stations, Eagle had not met its burden of showing that its proposal would comply with Note 5 to Section 73.3555 of the Commission's Rules.

[5] Ultimately, the instant assignment application modified this agreement such that Big Horn would acquire KCTZ(TV)'s construction permit and all its assets. In exchange, Big Horn agreed, among other things, to assume $275,000 of the seller's debt, to advance the funds necessary for the continued operation of the station in the interim, and to forgive BBA's indebtedness to Big Horn for funds borrowed for the construction and operation of the station.

[6] At that time, Curtis was also Vice President, a director and 11.6 percent shareholder of Big Horn. He resigned his positions as an officer and director of Big Horn in June, 1987.

[7] It is unclear from the pleadings exactly when Curtis was named Station Manager, but, for purposes of discussion, we will assume that he was given that title sometime prior to the date the station became operational in September 1987.

[8] The staff's June 28, 1988, action also affirmed previous grants of BBA's applications for extensions of time to construct the station (BMPCT-860616KH and BMPCT-870707KE) and denied Reier's pleadings challenging those applications. Reier's petition to deny BBA's pending license application (BLCT-870908KG), however, was granted, in part, by the staff, and the permittee was directed to file a modification application to conform its authorization to its constructed facilities within 30 days of the release of the staff's decision. On August 12, 1988, BBA filed the required modification application (BMPCT-880812KF). Reier does not challenge the staff's finding with respect to the license application, nor does it oppose the modification application.

[9] Reier also argues that, by its terms, BBA's network affiliation agreement with ABC will terminate if KCTZ(TV) ceases to be under common ownership with KOUS-TV. By that, Reier infers that ABC currently treats KCTZ(TV) as a satellite of KOUS-TV.

[10] While Reier is correct insofar as she states that the *Alabama* case involved the renewal of licenses and not an unauthorized transfer of control, that case, nevertheless, does stand for the proposition that a station may delegate certain day-to-day functions to a third party, so long as ultimate responsibility remains with the licensee.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-526

In the Matter of

Amendment of Section 73.202(b), RM-7422
Table of Allotments,
FM Broadcast Stations.
(Eagle, Idaho)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 22, 1990; Released: November 8, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it a petition for rule making filed by Cynthia Anne Siragusa ("petitioner"), proposing the allotment of Channel 263C2 to Eagle, Idaho, as that community's first local FM service. Petitioner states her intention to apply for the channel, if allotted.

2. Channel 263C2 conflicts with a construction permit for Station KQXR(FM), Channel 262C1, Payette, Idaho. Therefore, in an effort to accommodate petitioner's proposal, we sought an alternate channel and have determined that Channel 300C2 can be allotted to Eagle. Channel 300C2 can be allotted to Eagle in compliance with the Commission's minimum distance separation requirements.[1]

3. In view of the fact that Eagle could receive its first local FM channel, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Eagle, Idaho	--	300C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 31, 1990,** and reply comments on or before **January 15, 1990,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Denise B. Moline
McCabe & Allen
9105 Owens Drive
P.O. Box 2126
Manassas Park, VA 22111
(Attorney for petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment

is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates are North Latitude 43-41-42 and West Longitude 116-21-12.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-527

In the Matter of

Amendment of Section 73.202(b),	RM-7302
Table of Allotments,	RM-7490
FM Broadcast Stations.	
(Huntsville and Marshall,	
Missouri)	

NOTICE OF PROPOSED RULE MAKING

Adopted: October 22, 1990; Released: November 8, 1990

By the Deputy Chief, Policy and Rules Division:

1. The Commission has before it for consideration two separate conflicting petitions for rule making. The first petition was filed by Ms. Garnet Tuttle (Tuttle), requesting the allotment of FM Channel 248C2 to Marshall, as that community's second FM broadcast service. The second petition was filed by Contemporary Broadcasting, Inc. (Contemporary), requesting the substitution of FM Channel 247C2 for Channel 223A at Huntsville, Missouri, and modification of the construction permit for Channel 223A to specify operation on Channel 247C2. The allotment could provide Marshall with a second FM service or a first wide coverage station for Huntsville.

2. We shall offer both proposals for comment and request Tuttle and Contemporary or other parties to provide a comparative analysis on the proposals. In particular, the showings should demonstrate from the proposed sites which of the proposals will provide service to a greater population and area in the expanded service area. Channel 248C2 can be allotted to Marshall, Missouri, in compliance with the minimum distance separation requirements of the Commission's Rules, provided there is a site restriction 14.6 kilometers (9 miles) north of the community.[1] The site restriction will prevent a conflict with the construction permit for Channel 246A, La Monte, Missouri (BPH-890313MM), and to a rule making proceeding to upgrade the Class A channel at La Monte to a Class C3 channel (RM-7216), and to Station KAYQ, Channel 249A, Warsaw, Missouri. There remains a short spacing to Station KZBK, Channel 249A, Brookfield, Missouri. However, Station KZBK has been issued a construction permit to modify its station to Channel 245C2 (BPH-891016IA). The grant of a license for Channel 248C2 at Marshall will be contingent on Station KZBK being licensed on Channel 245C2. Channel 247C2 can be allotted to Huntsville, Missouri, at petitioner's specified site 23 kilometers (14.3 miles) north of the community.[2] In addition, we shall propose to modify the construction permit for Channel 223A, Huntsville, Missouri, to specify operation on Channel 247C2. However, pursuant to Section 1.420(g) of the Commission's Rules, should another party indicate an interest in the Class C2 allotment at Huntsville, the modification could not be implemented unless an additional equivalent channel is allotted. [3]

3. In order to provide a wide coverage area channel for Marshall, Missouri, or Huntsville, Missouri, the Commission proposes to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules as follows:

City	Channel No. Present	Proposed
ALTERNATIVE I		
Huntsville, Missouri	223A	247C2
ALTERNATIVE II		
Marshall, Missouri	275C1	248C2, 275C1

4. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this *Notice* by Certified Mail, Return Receipt Requested, to the following:

Dwight Carver
107 S. Main
Brookfield, Missouri 64628

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **December 31, 1990,** and reply comments on or before **January 15, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Ms. Garnet Tuttle
533 Ashbury Drive
Fond du Lac, Wisconsin
54935

Larry G. Fuss
Contemporary
Communications
Post Office Box 159
Fayetteville, Georgia 30214
(Consultant to Garnet Tuttle)

Contemporary Broadcasting,
Inc.
1360 S. 5th Street
Suite 365
St. Charles, Missouri 63301

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] The coordinates for Channel 248C2 are 39-14-41 and 93-09-37.

[2] The coordinates for Channel 247C2 are 39-38-00 and 92-27-00.

[3] Contemporary indicates Channel 278C2 is available for other interests.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-529

In the Matter of

Amendment of Section 73.202(b), RM-7440
Table of Allotments,
FM Broadcast Stations.
(Waupun and Omro, Wisconsin)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 23, 1990; Released: November 8, 1990

By the Assistant Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Midwest Dimensions, Inc. ("petitioner"), permittee of Station WPKR(FM) (formerly WGGQ), Channel 258C2, Waupun, Wisconsin, requesting the reallotment of its channel to Omro, Wisconsin, and modification of its construction permit accordingly. Petitioner filed information in support of its proposal.

2. Petitioner seeks to invoke the provisions of Section 1.420(i) of the Commission's Rules.[1] In this regard, petitioner advises that the requested change to Omro is mutually exclusive with the allotment of Channel 258C2 at Waupun. Petitioner indicates that operating from the site specified in construction permit (BMPH-890810ID), Station WPKR(FM) places a 70dBu signal over the entire community of Omro. Petitioner adds that Waupun (population 8,132)[2] has an AM station, [3] whereas Omro (population 2,763) has no local service. Thus, petitioner's proposal would provide a first local broadcast service to Omro, and would not deprive Waupun of its only local service.

3. A staff engineering analysis indicates that Channel 258C2 can be allotted to Omro, Wisconsin, in conformity with the Commission's Rules at petitioner's specified site.[4] Channel 258C2 is short-spaced to Channel 257A, Station WOWN, Shawano, Wisconsin. However, Station WOWN was ordered to Channel 257C3 in MM Docket No. 89-511. *See* 5 FCC Rcd 5268 (1990). Since the allotment at Omro is contingent on the licensing of Station WOWN on the new channel, final licensing of Station WPKR(FM) may be delayed until the license grant occurs at Shawano.

4. We believe the public interest would be served by proposing to reallot Channel 258C2 from Waupun to Omro in order to provide Omro with its first local FM transmission service. Therefore, we shall propose to modify the construction permit for Station WPKR(FM), as requested, to specify Omro as its community of license. In accordance with the provisions of Section 1.420(i) of the Commission's Rules, we shall not accept competing expressions of interest for Channel 258C2 at Omro.

5. Accordingly, we seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the community listed below, as follows:

	Channel No.	
City	Present	Proposed
Waupun, Wisconsin	258C2	-----
Omro, Wisconsin	-----	258C2

6. IT IS FURTHERED ORDERED, That the Secretary of the Commission SHALL SEND by Certified Mail, Return Receipt Requested, a copy of this *Notice* to the following:

Wheeler Broadcasting, Inc.
1456 East Green Bay Street
Shawano, Wisconsin 54116
(Licensee of Station WOWN)

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **December 31, 1990,** and reply comments on or before **January 15, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Eugene T. Smith
715 G Street, S.E.
Washington, D.C. 20003
(Counsel for the petitioner)

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission

specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] *See Report and Order*, MM Docket No. 88-526, 4 FCC Rcd 4870(1989), *recon. pend.*

[2] Population figures referenced herein are from the 1980 U.S. Census.

[3] Petitioner is also the licensee of AM station WMRH(AM), which is licensed to Waupun. An application for assignment of license to BBK Broadcasting, Inc., is pending (BAL-900413EA).

[4] The coordinates for Channel 258C2 at Omro are 43-50-51 and 88-51-31.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-528

In the Matter of

Amendment of Section 73.202(b), RM-7498
Table of Allotments,
FM Broadcast Stations.
(McLain, Mississippi)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 23, 1990; Released: November 8, 1990

By the Assistant Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed by Community Broadcasting, Inc. ("petitioner"), seeking the allotment of FM Channel 245A to McLain, Mississippi, as that community's first local broadcast service. Petitioner provided an engineering study in support of the petition and indicated it would apply for the channel, if allotted.

2. We believe the proposal warrants consideration because the proposed allotment could provide a first local broadcast service to McLain. Channel 245A can be allotted to McLain in compliance with the minimum distance separation requirements of the Commission's Rules provided there is a site restriction 11.7 kilometers (7.3 miles) southeast of the community.[1] The site restriction will prevent a conflict with the vacant allotment site for Channel 243A, Richton, Mississippi.

3. In view of the above, the Commission believes it would serve the public interest to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
McLain, Mississippi	----	245A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 31, 1990,** and reply comments on or before **January 15, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John S. Neely
Miller & Fields, P.C.
P.O. Box 33003
Washington, D.C. 20033
(Counsel to the petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It

should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 245A are 31-03-54 and 88-43-01.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-408

In the Matter of

Amendment of Section 73.202(b), RM-6838
Table of Allotments,
FM Broadcast Stations.
(Branson, Missouri)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 22, 1990; Released: November 8, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 6951 (1989), proposing the substitution of FM Channel 292C3 for Channel 292A at Branson, Missouri. The *Notice* was issued in response to a petition filed by Turtle Broadcasting Company of Branson (petitioner). The *Notice* also proposed the modification of the license for Station KRZK, Channel 292A, to specify operation on Channel 292C3. Petitioner filed supporting comments reaffirming its intention to apply for the channel. No other comments were received.

2. We believe the public interest would be served by substituting Channel 292C3 for Channel 292A at Branson, Missouri, providing the community with enhanced FM broadcast service. As indicated in the *Notice*, Channel 292C3 can be allotted to Branson consistent with the Commission's spacing requirements at petitioner's specified site 15.8 kilometers (9.8 miles) north of the community.[1] Issuance of a construction permit for Channel 292C3 may be withheld, however, until Station KGBX, Bolivar, Missouri, is licensed on Channel 290C2 in accordance with MM Docket 88-64[2] and Station KOZX, Cabool, Missouri, is located on Channel 251A in accordance with MM Docket 86-410. [3] We have authorized a modification of petitioner's license for Station KRZK, Branson, to specify operation on Channel 292C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 24, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

City	Channel No.
Branson, Missouri	292C3

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Turtle Broadcasting Company of Branson, for Station KRZK, Branson, Missouri, IS MODIFIED TO SPECIFY operation on Channel 292C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That the Secretary shall send a copy of this Order BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, to the following:

Sunburst II, Inc.
6600 LBJ Freeway
Suite 4100
Dallas, Texas 75240

Tom L. Mason
President & General Manager
Radio Station KOZX
KVVC Broadcasting, Inc.
Box 514, Junction M
and Business Route 60
Cabool, Missouri 65689

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The coordinates for Channel 292C3 are 36-47-00 and 93-12-00. Since this allotment is made as a result of a petition for rule making filed prior to October 2, 1989, the licensee may avail itself of the provision of Section 73.213(c) of the Commission's Rules. *See* 47 CFR § 73.213(c).

[2] Station KGBX (formerly KYOO), Bolivar, has been upgraded to Channel 290C2, effective August 26, 1988. *See* 3 FCC Rcd 4314 (1988).

[3] Station KOZX, Channel 292A, Cabool, was ordered to Channel 251A, effective February 27, 1989. *See* 4 FCC Rcd 601 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-530

In the Matter of

Amendment of Section 73.202(b), RM-7472
Table of Allotments,
FM Broadcast Stations.
(Baker, California)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 25, 1990; Released: November 8, 1990

By the Assistant Chief, Policy and Rules Division:

1. A petition for rule making has been filed on behalf of Althea Bauers ("petitioner") seeking the allotment of FM Channel 261B to Baker, California, as that community's second local FM service. Petitioner states her intention to apply for the channel, either individually or as a principal of a corporation to be formed, if it is allotted.

2. A staff engineering review of petitioner's proposal has determined that Channel 261B can be allotted to Baker in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, with a site restriction of 22.6 kilometers (14.1 miles) west[1] of the community to avoid a short-spacing to Station KXVR(FM), Channel 258B, Mountain Pass, California.[2] However, because Baker is located within 320 kilometers (199 miles) of the U.S.-Mexican border, the Commission must seek concurrence of the Mexican government in this proposal.

3. We believe the public interest would be served by proposing the allotment of Channel 261B to Baker, California, since the allotment would provide the community with an additional local FM service. Accordingly, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Baker, as follows:

	Channel No.	
City	Present	Proposed
Baker, California	268B	261B,268B

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 31, 1990,** and reply comments on or before **January 15, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Daniel F. Van Horn, Esq.
Arent, Fox, Kintner, Plotkin & Kahn
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will

be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Coordinates used for Channel 261B at Baker are 35-15-42 and 116-19-20.

[2] Coordinates at the licensed site of Station KXVR(FM) at Mountain Pass, California, are 35-29-27 and 115-33-27.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-479

In the Matter of

Quests, Inc.
Linesville, Pennsylvania

Licensee of Radio Station
WAST(AM), Ashtabula, Ohio

Order to Show Cause Why the
License of Station WAST(AM)
Ashtabula, Ohio, Should
Not Be Revoked

ORDER TO SHOW CAUSE
AND
HEARING DESIGNATION ORDER

Adopted: October 4, 1990; Released: November 7, 1990

By the Commission:

1. The Commission has before it for consideration: (a) the license of Quests, Inc., for daytime only Radio Station WAST(AM), Ashtabula, Ohio; and, (b) the results of the Commission's investigation into WAST(AM)'s unauthorized silent status.

2. WAST(AM), Ashtabula, Ohio, has been off the air since 1981. From 1981 until 1984 the licensee had permission to be silent. The station has been off the air since 1984 without permission. Due, in part, to a civil suit judgment against the licensee, it no longer possesses the station's real or broadcast related property. The discord that has been demonstrated between the majority and minority shareholders in the licensee have apparently left the licensee unable to engage in a transfer to an entity willing and able to restore service. Since the licensee has been off the air for an extended period of time, lacks the equipment to operate the station, does not have Commission permission to remain off the air, and has not turned in its license, it is in apparent violation of Sections 73.1740(a)(4) and 73.1750 of the Commission's Rules.[1]

3. Accordingly, IT IS ORDERED, That pursuant to Section 312(a)(3) and (4) of the Communications Act of 1934, as amended, Quests, Inc., is DIRECTED TO SHOW CAUSE why the license for Radio Station WAST(AM), Ashtabula, OH, should not be REVOKED, at a hearing to be held at a time and location specified in a subsequent Order, upon the following issues:

(a) To determine whether Quests, Inc., violated Sections 73.1740(a)(4) and/or 73.1750 of the Commission's Rules.

(b) To determine, in light of the evidence adduced under the foregoing issue, whether Quests, Inc., possesses the requisite qualifications to be or remain licensee of the captioned radio station.[2]

4. IT IS FURTHER ORDERED, That the Chief, Mass Media Bureau, is directed to serve upon Quests, Inc., within thirty (30) days of the release of this Order, a Bill of Particulars with respect to Issues (a) and (b) above.

5. IT IS FURTHER ORDERED, That pursuant to Section 312(d) of the Communications Act of 1934, as amended, both the burden of proceeding with the evidence and the burden of proof shall be upon the Mass Media Bureau as to both issues.

6. IT IS FURTHER ORDERED, That to avail itself of the opportunity to be heard, the licensee, pursuant to Section 1.91(c) of the Commission's Rules, in person or by attorney, shall file with the Commission within thirty (30) days of the receipt of the Order to Show Cause a written appearance stating that it will appear at the hearing and present evidence on the matters specified in the Order. If the licensee fails to file an appearance within the time specified, the right to a hearing shall be deemed to have been waived. Where a hearing is waived, a written statement in mitigation or justification may be submitted within thirty (30) days of the receipt of the Order to Show Cause. *See* Section 1.92(a) of the Commission's Rules. In the event the right to a hearing is waived, the presiding officer, or the Chief Administrative Law Judge if no presiding officer has been designated, will terminate the hearing proceeding and certify the case to the Commission in the regular course of business and an appropriate Order will be entered. *See* Section 1.92(c) and (d) of the Commission's Rules. [3]

7. IT IS FURTHER ORDERED, That if it is determined that the hearing record does not warrant an Order revoking the license for Station WAST(AM), Ashtabula, OH, it shall be determined if Quests, Inc., willfully or repeatedly violated Section 73.1740(a)(4) or Section 73.1750 of the Commission's Rules. If so, it shall also be determined whether an Order for Forfeiture shall be issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, in an amount up to $250,000 for the willful or repeated violations of Section 73.1740(a)(4) and/or Section 73.1750 of the Commission's Rules.

8. IT IS FURTHER ORDERED, That, in connection with the possible forfeiture liability noted above, this document constitutes notice pursuant to Section 503(b)(3) of the Communications Act of 1934, as amended. The Commission has determined that in every case designated for hearing involving the potential revocation of a station license, for alleged violations which also come within the purview of Section 503(b) of the Communications Act of 1934, as amended, it shall, as a matter of course, include this forfeiture notice so as to maintain the fullest possible flexibility of action. Since the procedure is thus a routine or standard one, we stress that the inclusion of this notice is not to be taken as in any way indicating what the initial or final disposition of the case should be; that judgment is, of course, to be made on the facts of each case.

9. IT IS FURTHER ORDERED, That the Chief, Mass Media Bureau, send a copy of this Order by *Certified Mail-Return Receipt Requested*, to:

Quests, Inc.
Radio Station WAST(AM)
P.O. Box 307
Linesville, PA 16424

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Section 73.1740(a)(4) provides:

> In the event that causes beyond the control of a licensee make it impossible to adhere to the operating schedule of this section or to continue operating, the station may limit or discontinue operation for a period of not more than 30 days without further authority from the FCC. Notification must be sent to the FCC in Washington, D.C. not later than the 10th day of limited or discontinued operation. During such period, the licensee shall continue to adhere to the requirements in the station license pertaining to the lighting of antenna structures. In the event normal operation is restored prior to the expiration of the 30 day period, the licensee will so notify the FCC of this date. If the causes beyond the control of the licensee make it impossible to comply within the allowed period, informal written request shall be made to the FCC no later than the 30th day for such additional time as may be deemed necessary.

Section 73.1750 provides:

> The licensee of each station shall notify the FCC in Washington, D.C. of permanent discontinuance of operation at least two days before operation is discontinued. Immediately after discontinuance of operation, the licensee shall forward the station license and other instruments of authorization to the FCC, Washington, D.C. for cancellation.

[2] We note that WAST(AM) has had action on a license renewal application deferred since December 1, 1981. Should the instant action be decided against the licensee, that deferred renewal application will be dismissed as moot.

[3] The Commission has delegated authority for cases such as this to the Mass Media Bureau. *See In the Matter of Radio Northwest Broadcasting Company*, 4 FCC Rcd 596 n. 3 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE
Released: November 2, 1990

FCC ANNOUNCES ONA JOINT CONFERENCE MEETING (CC Docket 88-2, Phase I)

The Federal/State Joint Conference on Open Network Architecture (ONA) will convene at 1:00 p.m. on Thursday, November 15, 1990, at the Marriott's Orlando World Center, World Center Drive, Orlando, Florida. It will be held in the Grand Ballroom, Salons IX-XI, on the first floor. The meeting will be open to the public, although participation is limited to state and federal Joint Conference members.

The Joint Conference serves as an ongoing forum for state/federal cooperation to facilitate the development and implementation of ONA. The creation of a Joint Conference was initially announced in the Federal Communications Commission's *BOC ONA Order* (4 FCC Rcd 1 (1989)). Three FCC Commissioners and thirteen state commissioners are eligible to serve as Conference members.

For further information, contact Steve Svab, Office of Public Affairs, at (202) 632-5050; James Spurlock, Assistant to the Chief, Common Carrier Bureau, at (202) 632-6910; or Patrick Donovan of the CCB Policy Division, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE
Released: November 2, 1990

FCC ANNOUNCES MEETING OF JOINT BOARD (CC Docket No. 80-286)

The Federal/State 80-286 Joint Board will convene at 4:00 p.m. on Thursday, November 15, 1990, at the Marriott's Orlando World Center, World Center Drive, Orlando, Florida. It will be held in the Grand Ballroom, Salons IX-XI, on the first floor. The meeting will be open to the public, although participation is limited to state and federal Joint Board members.

The 80-286 Joint Board was established ten years ago to recommend revisions to certain sections of Part 67 (currently Part 36) of the Commission's rules in order to reflect changes intelecommunications technology. These rules prescribe the precedures that telecommunications companies must follow in assigning cost to the interstate jurisdiction.

For further information, contact Steve Svab, Office of Public Affairs, at (202) 632-5050, or James Spurlock, Assistant to the Chief, Common Carrier Bureau, at (202) 632-6910.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELESPHERE NETWORK, INC.
Complainant,

v.

THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,	File No. E-90-171
NORTHWESTERN BELL TELEPHONE COMPANY, and	File No. E-90-172
PACIFIC NORTHWEST TELEPHONE COMPANY, Defendants.	File No. E-90-173

ORDER

Adopted: October 25, 1990; Released: November 6, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On May 11, 1990, Telesphere Network, Inc. (hereinafter "Telesphere") filed with Commission the above-captioned formal complaints against The Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Telephone Company (hereinafter the "Defendants") seeking reimbursement and other appropriate relief for interstate access charges levied by the Defendants against Telesphere during the period January 1, 1987 through December 31, 1988. In accordance with Commission rules governing formal complaint proceedings, the Defendants filed answers to the complaints.

2. The parties to the above-captioned complaints have conducted discussions aimed at settling the complaints. As a result of these negotiations, the parties state that a mutually agreeable settlement of all pending controversies has been reached. On September 21, 1990, the parties filed a Stipulation of Dismissal and a joint motion seeking dismissal of the complaints with prejudice. We are satisfied that dismissal of the complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Joint Motion to Dismiss the above-captioned complaints IS GRANTED and that the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE AND TELEGRAPH COMPANY,
Complainant,

v. File No. E-90-61

NEVADA BELL, INC.,
Defendant.

ORDER

Adopted: October 26, 1990; Released: November 6, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On November 22, 1989, the American Telephone and Telegraph Company (hereinafter "AT&T") filed with the Commission the above-captioned formal complaint against Nevada Bell, Inc. (hereinafter the "Defendant") seeking recovery of damages for Defendant's alleged overearnings on interstate access services for the period January 1, 1987 through December 31, 1988. In accordance with Commission Rules governing formal complaint proceedings, the Defendant filed an answer to the complaint.

2. The parties to the above-captioned complaint have conducted discussions aimed at settling the complaint. As a result of these negotiations, the parties state that a mutually agreeable settlement of all pending controversies has been reached. On October 23, 1990, the parties filed a joint motion seeking dismissal of the complaint with prejudice. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Joint Motion to Dismiss IS GRANTED and that the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MTS and WATS	**CC Docket No. 78-72**
Market Structure	**CC Docket No. 80-286**

Amendment of Part 36 of the
Commission's Rules and
Establishment of a Joint Board

ORDER

Adopted: October 5, 1990; Released: November 8, 1990

By the Commission:

1. On December 7, 1989, the Ad Hoc Telecommunications Users Committee (Ad Hoc) filed a motion to postpone until July 1, 1990 the effective date of amendments to Section 36.154 (a) of the Commission's Rules, 47 C.F.R. § 36.154 (a). This rule delineates the separations treatment of mixed use special access lines, *i.e.*, special access lines carrying both interstate and intrastate traffic.[1] Ad Hoc's motion to postpone is granted to the extent described below and otherwise denied.

2. The Commission adopted these separations changes based on recommendations prepared by the Federal-State Joint Board in CC Docket No. 80-286.[2] The Joint Board concluded that direct assignment of the cost of mixed use special access lines to either the state or interstate jurisdiction is preferable to allocating the cost of each special access line between the jurisdictions. The Joint Board further recommended that the Commission assign mixed use special access lines carrying *de minimis* amounts of interstate traffic directly to the intrastate jurisdiction. [3] Special access lines carrying more than a *de minimis* amount of interstate traffic would be assigned to the interstate jurisdiction. In adopting the Joint Board recommendations, the Commission established January 28, 1990, as the effective date for this change in the separations rules.

3. Ad Hoc, in its December 7, 1989 motion, asserts that neither the carriers nor their customers will be able to comply with the new requirements by January 28, 1990. Ad Hoc argues that "substantial confusion" exists in the user community concerning how to comply with the amendments.[4] For example, Ad Hoc asks whether customers should certify each existing special access line, certify lines in groups, or identify only those lines requiring a change in jurisdiction. In addition, Ad Hoc contends that it is unclear whether the customer should determine its ten percent certification based on traffic at a single point in time or over a period of time.[5] Ad Hoc states that that once these and other issues are resolved, customers will need additional time to educate personnel, process paperwork, and develop the necessary certifications. Finally, Ad Hoc argues that by postponing the effective date until July 1, 1990, the Commission will be able to act on pending petitions requesting reconsideration of the *Decision and Order* and respond to tariff filings in a more efficient manner.[6]

4. Aeronautical Radio, Inc. (ARINC) supports Ad Hoc's motion. ARINC claims that several questions concerning application of the revised rule remain unresolved, including the obligation of end users to reassess traffic patterns and the allocation of responsibilities between end users and interexchange carriers.[7] Pacific Bell and Nevada Bell (Pactel) also support a postponement until July 1, 1990, but only because this would coincide with the effective date of annual revisions to their access tariffs. Pactel claims that Ad Hoc's petition is an untimely petition for reconsideration. Furthermore, Pactel asserts that the decision to refrain from requiring a precise traffic measurement substantially reduces implementation concerns. Finally, Pactel states that it does not expect the new requirements to generate unreasonable amounts of paperwork and claims that existing processing offices can manage the workload without any undue hardship.[8]

5. On December 14, 1989, the local exchange carriers filed tariff revisions implementing the separations rule changes. Several parties filed petitions to reject or suspend of these tariff filings. The Common Carrier Bureau subsequently waived implementation of the revised separations rules until March 14, 1990, in order to allow sufficient time to review the tariffs.[9] Subsequently, the local exchange carriers deferred the effective date of their tariffs to May 1, 1990, and the Bureau waived compliance with the revised separations rules until implementing tariffs became effective.[10]

6. The tariff transmittals became effective on May 15, 1990.[11] Given the developments that have taken place, we do not believe that any further postponement of the effective date of the amendments to Section 36.154 (a) is necessary or desirable. Customers have had ample notice of this rule change, which was adopted in July, 1989. Thus, we conclude that customers had sufficient time, prior to the effective date, to educate personnel on most of the changes required by the new rule, and to implement necessary changes in procedure. We are confident that coordination of final implementation details need not delay the effective date and that carriers and customers can and will make any necessary adjustments. Accordingly, we deny Ad Hoc's motion to postpone until July 1, 1990, the effective date of these amendments.

7. Accordingly, IT IS ORDERED, that Ad Hoc's motion to postpone the effective date of the amendments to Section 36.154 (a) of the Commission's Rules IS GRANTED to the extent described herein and is otherwise DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, *Decision and Order*, 4 FCC Rcd 5660 (1989).

[2] Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, *Recommended Decision and Order*, 4 FCC Rcd 1352 (1989).

[3] Under the Joint Board recommendation, the interstate traffic on a special access line would be deemed *de minimis* when it amounts to 10 percent or less of the total traffic on the line.

[4] Petition at 2.

[5] Petition at 2-3.

[6] Petition at 3-4.

[7] Comments of Aeronautical Radio, Inc., In Support of Motion to Postpone Effective Date, filed December 18, 1989.

[8] Pactel Reply to Motion of Ad Hoc Telecommunications Users Committee to Postpone Effective Date of Amendment to Section 36.154 (a) of the Commission's Rules, filed December 21, 1989.

[9] Waiver of Section 36.154 (a) of the Commission's Rules, 5 FCC Rcd 710 (1990).

[10] Waiver of Section 36.154 (a) of the Commission's Rules, DA 90-413, released March 13, 1990.

[11] Local Exchange Carriers' Revisions to Tariffs to Implement Section 36.154 (a) of the Commission's Rules, DA 90-703, released May 14, 1990.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-275

In re Applications of

JULIA S. ZOZAYA	File No. BPH-860703MI
FLAGSTAFF BROADCASTING FOUNDATION	File No. BPH-860707NQ
FLAGSTAFF BROADCASTING PARTNERSHIP	File No. BPH-860707OC

For a Construction Permit for a New FM Station in Flagstaff, Arizona

MEMORANDUM OPINION AND ORDER

Adopted: October 25, 1990; Released: November 8, 1990

By the Commission:

1. This proceeding involves mutually exclusive applications for authority to construct and operate a new commercial broadcast station in Flagstaff, Arizona. The Board affirmed an initial decision by Administrative Law Judge John M. Frysiak, which granted the application of Flagstaff Broadcasting Partnership (FBP) and denied the applications of Julia S. Zozaya and Flagstaff Broadcasting Foundation. *Julia S. Zozaya*, 4 FCC Rcd 6271 (I.D. 1989), *aff'd*, 5 FCC Rcd 856 (Rev. Bd. 1990). The Board determined that FBP should only be assessed a slight diversification demerit for the interest of its principal in an FM station in Sturgeon Bay, Wisconsin. *Id.* at 857 ¶ 8. The Board also found that the ALJ did not err in refusing to award any integration credit to Foundation because there will be no participation by its owners in the day-to-day management of the proposed facility. *Id.* at 858 ¶ 16. Finally, the Board held that Zozaya's integration pledge is inherently unreliable based on her proposal to devote a minimum of 70 hours a week to two proposed facilities located 135 miles apart. *Id.* at 858 ¶ 15. Accordingly, the Board granted FBP's application, finding FBP clearly superior based on 100% integration credit offset by a slight diversification demerit. After careful consideration of the Review Board decision and the pleadings filed in response,[1] we affirm the Board's decision in this matter. We wish, however, to comment on certain matters.

I. ZOZAYA'S INTEGRATION CREDIT

2. Zozaya proposes full-time integration at the Flagstaff station and part-time integration at an FM station to be constructed in Paradise Valley, Arizona for which Zozaya's application is presently pending. Zozaya challenges the Board's decision to uphold the ALJ's determination that Zozaya's integration proposal is not realistic. Zozaya contends that the Board's legal analysis directly contradicts controlling Commission policy set forth in *Omaha TV 15, Inc.*, 4 FCC Rcd 730 (1988). Moreover, Zozaya argues that the Board's decision contravenes the prohibition against disparate treatment of similarly situated applicants in *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965) because an applicant in another proceeding was awarded integration credit in similar circumstances.

3. The Board found that Zozaya proposes to devote at least 70 hours a week to her proposed facilities, 40 hours to Flagstaff and 30 hours to Paradise Valley, with an additional 25 hours a week devoted to civic activities. 5 FCC Rcd 857-858 ¶ 13, 15. Although precedent cited by the ALJ and the Board does not mandate the rejection of 70 hour a week proposals *per se*, it does warrant the rejection of proposals that, in light of all relevant circumstances, are not likely to be effectuated. *See Berryville Broadcasting Co.*, 70 FCC 2d 1, 11-12 ¶¶ 16-18 (Rev. Bd. 1978). The applicant has the evidentiary burden to demonstrate persuasively that she can overcome facially questionable aspects of her integration proposal. *See, e.g., Margaret Garza*, 1 FCC Rcd 1294 n.1 (Rev. Bd. 1986). Zozaya claims that she adequately explained her plan for managing both stations; however it is not clear from the record the number of days a week she intends to devote to this plan.[2] Zozaya supports her integration proposal with testimony that she previously worked 16 hour days, very often including weekends, managing her Phoenix station, KNNN(FM), which also allowed for Zozaya to combine time devoted to both work and civic activities. Tr. at 163-64, 179-81. Nevertheless, the Board and the ALJ cited factors sufficient to indicate that Zozaya's proposal is not likely to be effectuated, namely, her proposed 14 hour work days, which do not allow for circumstances in which one or both stations require more than the time allotted. [3] Zozaya herself acknowledged that the Flagstaff station may at times require more than 40 hours a week of her time. Tr. at 184-85. Moreover, Zozaya pledges at least some time to civic activities.[4] Tr. at 179. Thus, we agree with the Board that Zozaya does not have a clearly defined plan capable of effectuation. *Julia S. Zozaya*, 4 FCC Rcd 6271, 6275-76 ¶¶ 54-55 (I.D. 1989), *aff'd*, 5 FCC Rcd 856, 858 ¶ 14 (Rev. Bd. 1990).

4. We also reject Zozaya's argument that the Board's decision violates *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965), by treating Zozaya differently than a similarly situated applicant who was awarded integration credit. Zozaya bases this argument on the Board's decision in *Royce International Broadcasting*, 4 FCC Rcd 7139, 7142 ¶¶ 19-20 (Rev. Bd. 1989), *application for review pending*. In that case, the Board affirmed the ALJ's rejection of an applicant's proposal to work full-time at both a station in Sacramento, California and one in Burbank, California. The ALJ did, however, credit the winning applicant with 30 hours a week part-time integration credit. Following the ALJ's ruling in *Royce*, the Commission reexamined the practice of awarding part-time credit. We concluded the better procedure is that where an ap-

plicant fails to establish how it will fulfill its integration proposal, integration credit will be denied; part-time credit will be awarded only when an applicant makes a specific showing demonstrating the number of hours that it will be integrated on a part-time basis. *Cuban - American Limited*, 5 FCC Rcd 3781, 3786 n.3 (1990), *petition for reconsideration pending*. Zozaya did not make a showing warranting part-time credit in accordance with *Cuban-American Limited*. In light of Zozaya's failure to meet the Commission's definitive standard, which superseded the ALJ's ruling in *Royce*, there is no need to reconcile this case with *Royce*.[5] Moreover, even if Zozaya had made a showing entitling her to part-time integration credit, she would not have been awarded the construction permit because FBP, the winning applicant, proposes full-time integration.

II. FOUNDATION'S INTEGRATION AND DIVERSIFICATION CREDIT

5. Foundation's principals will not participate in the day-to-day management of the station. They instead propose to serve as the station's governing board with the exclusive responsibility for establishing station policy and supervising the implementation of that policy by the station's staff. Foundation contends that, nonetheless, it should have been awarded integration credit for this proposal. We find that the Board's denial of integration credit to Foundation is consistent with Commission precedent. We do not consider the delegation of management function to employees as the functional equivalent of integration. *See, e.g., Central Florida Enterprises, Inc. v. FCC*, 598 F.2d 37, 55-56 (D.C. Cir. 1978), *cert. dismissed*, 441 U.S. 957 (1979). Moreover, because Foundation is entitled to no quantitative integration credit, it cannot receive qualitative enhancement credit for the minority status of its principals. *See, e.g., Waters Broadcasting Corp.*, 91 FCC 2d 1260, 1264 ¶ 8 (1982). We therefore affirm the Board's decision to uphold the ALJ's denial of integration credit to Foundation.

6. Foundation further argues that it is entitled to a diversification preference based on the low- to moderate-income status of its principals. Foundation contends that its proposal would further the goal of diversification by adding a new voice to the broadcast spectrum because its owners belong to economic groups whose perspective is presently unavailable to Flagstaff listeners. Foundation cites *TV 9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1974), *cert. denied*, 419 U.S. 986 (1974), in support of its argument.

7. There is no precedent for awarding a preference to Foundation because its principals are individuals of low and moderate income. First, enhancement credit based on non-structural preferences like race and gender is awarded under the integration criterion, not the diversification criterion, as suggested by Foundation. *See WPIX, Inc.*, 68 FCC 2d 218, 411-412 ¶ 87 (1974). Second, enhancement credit is awarded only for those owners who propose meaningful participation in the day-to-day management of the station which, as we have concluded, is absent from Foundation's proposal. *See Mid-Florida Television Corp.*, 69 FCC 2d 607, 650-52 ¶¶ 89-96 (Rev. Bd. 1978), *set aside on other grounds*, 87 FCC 2d 203 (1981). Therefore, even if low income status were accorded enhancement credit, Foundation would not be eligible for such credit because its principals will not be integrated. *See WPIX*, 68 FCC 2d at 411-412 ¶ 87. In any event, even assuming we were to consider Foundation's request under the integration criterion, the Commission has not extended the enhancement credit which is awarded to women and minorities to other groups, and we are not inclined to exercise our discretion to adopt Foundation's proposal to do so for low- to moderate-income applicants in this proceeding. *See Broadcast Associates of Colorado*, 104 FCC 2d 16, 20 ¶ 6 (1986).

III. FBP'S DIVERSIFICATION CREDIT

8. Foundation also contends that the Board erred by affirming the ALJ's assessment of only a slight diversification demerit to FBP. We find no merit in Foundation's assertion that a more substantial demerit should have been imposed. The Board held that FBP should not be assessed more than a "slight" demerit for its 50% partner's 60% interest in ownership of WDCW(FM) in Sturgeon Bay, Wisconsin, 1400 miles distant from Flagstaff. 5 FCC Rcd 857 ¶ 8. While Foundation is correct that the Board erred in attributing only a 60% ownership interest in WDCW(FM) to FBP partner Boyd W. Fellows when Fellows' interest was 100% on the "B" cut-off date, that error is not of decisional significance. FBP is composed of two partners, each holding 50% voting and equity interests. 4 FCC Rcd at 6275 ¶ 28. Therefore, the ALJ correctly attributed a 50% interest (100% x 50%) in WDCW(FM) to FBP as compared with the 30% (60% x 50%) attributed by the Board. 4 FCC Rcd 6275 ¶ 46 n.4. *See Reginald A. Fessenden Educational Fund, Inc.*, 100 FCC 2d 440, 446-47 ¶ 7 (Rev. Bd. 1985), *rev. denied*, 59 RR 2d 1267 (1986). We do not consider the discrepancy significant.

9. The assessment of only a slight diversification demerit to FBP based on the Wisconsin station is nonetheless consistent with Commission precedent. *See Kennebec Valley Television, Inc.*, 2 FCC Rcd 1240 ¶ 4 (Rev. Bd. 1987), *rev. denied*, 3 FCC Rcd 4522 (1988); *Christian Broadcasting of the Midlands, Inc.*, 99 FCC 2d 578, 579-81 ¶¶ 3-5 (Rev. Bd. 1984), *rev. denied*, 103 FCC 2d 375 (1986). The Commission generally reserves more significant diversification preferences for situations in which the competing applicant has media interests in or near the community of license, as opposed to the distant interest involved here.[6] *See Ramon Rodriguez*, 5 FCC Rcd 4041 ¶ 2 (1990); *Focus Television Co.*, 98 FCC 2d 546, 553 ¶ 13 (Rev. Bd. 1984), *modified in other respects*, 1 FCC Rcd 1037 (1986). We therefore affirm the slight diversification demerit assessed to FBP.

IV. FBP'S INTEGRATION CREDIT

10. Foundation also challenges the award of 100% integration credit to FBP. FBP's integration proposal, filed after the "B" cut-off date, included a pledge that FBP's principals would divest themselves of ownership in or terminate employment with other broadcast stations in order to participate in the day-to-day management of the Flagstaff station. Foundation argues that because the employment and ownership interests were listed in the application, but FBP's divestiture pledge was not made until later, in its integration proposal, FBP's integration proposal conflicts with information found in FBP's application as of the date on which its comparative position was

fixed -- the "B" cut-off date. Therefore, Foundation argues that FBP should not have been given credit for integrating its principals into the management of the Flagstaff station.

11. Foundation's argument is without merit. As Foundation acknowledges, under the policy in effect at the time FBP filed its application for Flagstaff, an applicant did not have to set forth its integration proposal until ordered to do so by the ALJ.[7] Thus, a pledge to terminate or divest broadcast employment or ownership submitted after the "B" cut-off date would be timely for integration purposes as long as the pledge met the date established by the ALJ for exchange of hearing exhibits (although it would not be timely for diversification purposes). *See J. T. Parker Broadcasting Corp.*, 5 FCC Rcd 4651 ¶ 4 (1990); *Martin Intermart, Inc.*, 3 FCC Rcd 1650, 1651 n.1 (Rev. Bd. 1988); *Cuban-American Limited*, 2 FCC Rcd 3264, 3268 ¶ 19 (Rev. Bd. 1987), *rev. denied*, 5 FCC Rcd 3781 (1990), *petition for reconsideration pending*; *Reginald A. Fessenden Educational Fund, Inc.*, 100 FCC 2d 440, 450-51 ¶ 13 (Rev. Bd. 1985), *rev. denied*, 59 RR 2d 1267 (1986).

12. The Commission's decision in *Northland Communications*, 100 FCC 2d 914 (Rev. Bd. 1985), *aff'd* , 60 RR 2d 776 (1986), *aff'd by judgment sub nom. Up North Broadcasting Co. v. FCC*, 814 F.2d 774 (D.C. Cir. 1987), which Foundation cites in support of its argument, does not hold to the contrary. *Northland* states that an integration proposal filed after the "B" cut-off date may not contradict information specifically set forth in the application -- there, the identities of the applicant's principals. 100 FCC 2d at 917 ¶ 16. However, the application filed by FBP did not specify any information about its integration proposal, including whether its principals planned to terminate their present employment to effectuate their proposed integration. Thus, consistent with *Northland*, FBP could clarify its integration plans, after the "B" cut-off date, on the date specified by the ALJ. *Id.*; 60 RR 2d at 777 n.3. The award of 100% integration credit to FBP is therefore affirmed.

V. ORDERS

13. ACCORDINGLY, IT IS ORDERED, That the Applications for Review filed March 19, 1990 by Julia S. Zozaya and Flagstaff Broadcasting Foundation ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The following pleadings are before the Commission:

(1) an Application for Review filed March 19, 1990 by Zozaya;

(2) an Application for Review filed March 19, 1990 by Foundation; and (3) an Opposition to the Applications for Review filed April 3, 1990 by FBP.

[2] Zozaya intends to reside in Flagstaff. She stated that she would spend from 6:00 am to 10:00 am at the Flagstaff station, devoting her efforts during this time period equally to the Paradise Valley and Flagstaff stations. From 10:00 am to 5:00 pm or so (depending on the needs of the Flagstaff station), she would devote herself exclusively to Flagstaff. From 5:00 pm to 8:00 pm or so, she would work with her Paradise Valley staff by telephone. She would spend one day a week at the Paradise Valley station. Tr. 173-74. Zozaya indicates that in formulating her plan she relied on *Omaha TV 15, Inc.*, 4 FCC Rcd 730, 732-33 ¶¶ 14-24 (1988) for the proposition that an applicant may receive integration credit although not present at the station on a daily basis. *Omaha* does not, however, authorize integration credit based on time that the principal is not physically present at the station. *See Mid-Ohio Communications, Inc.*, 5 FCC Rcd 4597 ¶ 10 (1990). Consequently, it is not even clear how Zozaya would devote 40 hours a week to the Flagstaff station while physically present there, since she proposes to devote only 36 hours of the time she would spend in Flagstaff to that station during a 70 hour, 5 day a week schedule. We need not attempt to resolve this discrepancy, however, because we find in any event Zozaya has not shown her plan can be effectuated.

[3] Zozaya also argues that the Board erroneously concluded that the ALJ's decision found she pursued two contradictory full-time proposals and failed to disclose this fact in the Flagstaff proceeding. While the Board does express skepticism with respect to Zozaya's explanation for first proposing full-time integration at Paradise Valley at a time when a tentative settlement agreement had been reached in Flagstaff, the Board's decision ultimately rests on the ALJ's determination that Zozaya's proposal for full- time integration in Flagstaff and part-time integration in Paradise Valley is not credible rather than on any failure by Zozaya to disclose her plans.

[4] Zozaya also contends that the Board erred by finding that she will continue to devote 25 hours each week to civic activities in addition to the time she proposes to spend managing the Flagstaff and Paradise Valley stations. Zozaya points to testimony indicating that she would cut back on the time devoted to civic activities if necessary. Tr. at 179. The Board is correct that the ALJ's initial decision includes findings that Zozaya presently devotes 25 hours per week to civic activities and that she would continue these activities in the event of a grant. 4 FCC Rcd 6275 ¶ 15. However, the ALJ noted that her overall time commitment with respect to managing the two stations, allowing two hours each way for the 135 mile trip to Paradise Valley, "is a minimum of 74 hours and this does not allow *any time* for civic activities which Ms. Zozaya considers vital." 4 FCC Rcd 6275-6276 ¶ 54. (emphasis added.) Although the Board appears to have considered Zozaya's present commitment to civic activities a firm part of her proposal, it is also clear that *any* significant participation in civic activities would only further undermine the reliability of her integration proposal.

[5] In any event, no exceptions were taken to the award of part-time credit in *Royce*. The award of part-time integration credit was not of decisional significance since the outcome in *Royce* would have been the same even if the applicant had been denied all integration credit. Thus, there has been no opportunity for higher level review of the award of part-time credit in *Royce*.

[6] Foundation cites a 1973 Review Board case in support of its argument that a more substantial demerit should have been imposed. *Resort Broadcasting* Co., Inc., 41 FCC 2d 640, 644-45 ¶ 7 (Rev. Bd. 1973), *rev. denied*, FCC 74-139 (Feb. 6, 1974), *aff'd mem sub nom. Resort Broadcasting Co., Inc. v. FCC*, 511 F.2d 448 (D.C. Cir. 1975). In *Resort*, Foundation argues, a significant diversification preference was awarded to an applicant with no

media interests over an applicant whose 50% owner had interests in three separate mass media outlets which were located a great distance from the service area proposed. However, the Commission has clarified the nature of the preference granted in *Resort*, finding that the winning applicant actually received only a slight diversification preference which, on the facts of that case, was significant because it outweighed its opponent's two very slight preferences for integration and efficient frequency use. *Christian Broadcasting of The Midlands, Inc.*, 103 FCC 2d 375, 376 n.2 (1986), *denying review* of 99 FCC 2d 578 (Rev. Bd. 1984).

[7] This policy has since been changed. Applicants are now required to disclose integration proposals by the end of the period during which amendments may be filed as of right (previously referred to as the "B" cut-off date) or receive no credit for integration. *See In the Matter of Revision of Application for Construction Permit for Commercial Broadcast Station (FCC Form 301)*, 4 FCC Rcd 3853, 3860 ¶¶ 55-56 (1989).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-358

In re Applications of

TEXAS COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPH-870710MJ
BEAUMONT SKYWAVE, INC.	File No. BPH-870710NA
CHM BROADCASTING	File No. BPH-870710NC

For Construction Permit for New FM Station, Channel 273C2, Beaumont, Texas

MEMORANDUM OPINION AND ORDER

Adopted: October 30, 1990; Released: November 9, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL and ESBENSEN.

1. On October 1, 1990, the Review Board adopted a Decision, FCC 90R-90, in this case. Thereafter, CHM Broadcasting filed several pleadings pursuant to 47 CFR 1.65 which requires prompt reporting of "[s]ubstantial and significant changes in information furnished by applicants to the Commission."

2. CHM's pleadings include: (1) a Petition for Leave to Amend filed October 5, and supplemented on October 9, 1990, to update other broadcast interests acquired by CHM's limited partner; (2) a Petition for Leave to file Supplemental Statement filed October 5, and supplemented on October 9, 1990; reporting that a successor bank likely would not honor a predecessor bank's commitment; and (3) a petition for leave to file Section 1.65 statement filed October 16, 1990, to inform the Commission of recent developments regarding CHM's bank letter.

3. In its October 5 petitions, CHM has not shown compliance with the timeliness requirements of 47 CFR §1.65(b), which provides that: "whenever the information furnished in the pending application is no longer substantially accurate and complete in all significant respects, the applicant shall as promptly as possible and in any event within 30 days, unless good cause is shown . . . furnish such additional or corrected information as may be appropriate." However, the timeliness question is moot for all practical purposes since the Board has previously adopted a Decision denying CHM's application. We will therefore accept CHM's pleadings for reporting purposes only.

4. ACCORDINGLY, IT IS ORDERED That CHM Broadcasting's Petition for Leave to File Supplemental Statement filed October 5, and supplemented on October 9, 1990, Petition for Leave to Amend filed October 5, and supplemented on October 9, 1990, and Petition for Leave to File Rule 1.65 Statement filed October 16, 1990, ARE ACCEPTED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NATIONAL BROADCASTING COMPANY, INC.
Complainant,

v. File No. E-88-110

NEW YORK TELEPHONE COMPANY,
Defendant.

ORDER

Adopted: November 1, 1990; Released: November 7, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On August 3, 1988, the National Broadcasting Company ("NBC") filed the above captioned formal complaint against New York Telephone Company ("NYT"), alleging violations of §§ 201(b), 202(a), and 203(c) of the Communications Act, 47 U.S.C. §§ 201(b), 202(a) and 203(c). NBC alleged that NYT charged NBC the higher intrastate rate for four one way television transmission circuits located within New York City. NYT denied the allegations and filed a counterclaim and a motion to dismiss the complaint. By joint motion filed October 18, 1990, the parties advised the Commission that they had reached a mutually satisfactory settlement and requested that the above-captioned complaint be dismissed with prejudice.

2. We are satisfied that dismissal of these complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated under 47 C.F.R. § 0.291, that the joint motion for dismissal of the above-captioned complaints IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaints ARE DISMISSED WITH PREJUDICE and the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-531

In the Matter of

Amendment of Section 73.606(b), RM-7497
Table of Allotments,
TV Broadcast Stations.
(Tuscaloosa, Alabama)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 25, 1990; Released: November 9, 1990

By the Assistant Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed on behalf of Black Warrior Broadcasting (petitioner) requesting the allotment of UHF television Channel 23 to Tuscaloosa, Alabama, as that community's third local commercial television service. Petitioner provided information in support of the proposal and stated its intention to apply for the channel, if allotted.

2. Tuscaloosa (population 75,211),[1] the seat of Tuscaloosa County (population 137,541), is located in western Alabama, approximately 80 kilometers (50 miles) southwest of Birmingham. It is served locally by commercial television Stations WDBB(TV) (Channel 17)[2] and WCFT-TV (Channel 33). Additionally, non-commercial educational Channel *39 is vacant and unapplied for at Tuscaloosa at the present time.

3. A staff engineering analysis of the proposal indicates that UHF television Channel 23 can be allotted to Tuscaloosa consistent with the minimum distance separation requirements of Section 73.610 of the Commission's Rules, provided certain conditions are met. The transmitter site for proposed Channel 23 must be located at least 9 kilometers (5.6 miles) southeast [3] of the community to avoid short-spacing to co-channel Stations WELF(TV), Dalton, Georgia,[4] and to WMAO-TV, Greenwood, Mississippi.[5] Moreover, the proposed allotment of Channel 23 to Tuscaloosa will require a minus offset.[6]

4. Although the Commission has imposed a freeze on new television allotments in certain metropolitan areas, Tuscaloosa is not in one of the areas affected thereby.[7]

5. We believe the public interest would be served by proposing the allotment of Channel 23 to Tuscaloosa, Alabama, since it could provide the community with an additional local service. Accordingly, we seek comments on the proposed amendment to the TV Table of Allotments, Section 73.606(b) of the Commission's Rules, with respect to the community listed below, as follows:

	Channel No.	
City	Present	Proposed
Tuscaloosa, Alabama	17,33,*39-	17,23-,33,*39-

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **December 31, 1990,** and reply comments on or before **January 15, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Thomas J. Dougherty, Jr., Esq.
Frank R. Jazzo, Esq.
Fletcher, Heald & Hildreth
1225 Connecticut Ave., N.W.
Suite 400
Washington, D.C. 20036

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the TV Table of Allotments, Section 73.606(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the TV Table of Allotments, Section 73.606(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Population figures are taken from the 1980 U.S. Census.

[2] Channel 17 has been proposed for reallotment to Jasper, Alabama, in MM Docket No. 90-281. *See Notice of Proposed Rule Making,* 5 FCC Rcd 3429 (1990).

[3] Coordinates used for Channel 23 at Tuscaloosa are 33-08-16 and 87-30-26.

[4] Coordinates at the authorized site of Station WELF(TV) at Dalton, Georgia, are 34-57-07 and 85-22-58.

[5] Coordinates at the licensed site of Station WMAO-TV at Greenwood, Mississippi, are 33-22-34 and 90-32-32.

[6] "A station with a 'plus' or 'minus' offset is required to operate with its carrier frequency 10 kHz above or below the normal carrier frequency. A different offset between two television stations reduces interference and makes possible the separation criteria set forth in our Rules." *Crandon, Wisconsin,* 3FCC Rcd 6765 n.1 (1988).

[7] *See Notice of Inquiry,* 2 FCC Rcd 5125 (1987), and *Order,* 52 FR 28346, July 29, 1987.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Dorothy J. Owens, Debtor-in-Possession (Assignor) File No. BALCT-891109KI

and

Buck Owens Production Company, Inc. (Assignee)

For Assignment of License of Station KDOB-TV, Bakersfield, California

MEMORANDUM OPINION AND ORDER

Adopted: August 27, 1990; Released: November 8, 1990

By the Commission: Commissioner Duggan dissenting and issuing a statement.

1. The Commission has before it for consideration the above-captioned application for consent to the assignment of license of KDOB-TV, Channel 48 (IND), Bakersfield, California, from Dorothy J. Owens, Debtor-in-Possession (Dorothy Owens) to Buck Owens Production Company, Inc. (Buck Owens Production). Petitions to deny the assignment application were filed by Burnham Broadcasting Company, a Limited Partnership (Burnham), licensee of KBAK-TV, Channel 29, Bakersfield, California; KGET TV, Inc. (KGET), licensee of KGET(TV), Channel 17, Bakersfield, California; and Pappas Telecasting Incorporated (Pappas), licensee of KMPH(TV), Channel 26, Visalia, California (Petitioners),[1] and the applicants have responded.

2. Buck Owens Production, the assignee, is the licensee of radio stations KUZZ(AM) and KUZZ-FM, Bakersfield, California. The acquisition of KDOB-TV by Buck Owens Production would be inconsistent with Section 73.3555(b), the Commission's "one-to-a-market" rule, which generally prohibits common ownership of a television and radio stations in the same market. However, since KDOB-TV is in bankruptcy, Buck Owens Production has requested a waiver of the rule pursuant to the "failed station" exception.

3. In *Amendment of Section 73.3555*, 4 F.C.C. Rcd. 1741, *reconsidered in part*, 4 F.C.C. Rcd. 6489 (1989) *(Amendment of 73.3555)*, we relaxed the prohibition against the common ownership of radio and television stations in the same market by adopting a waiver policy under which we look favorably upon requests involving the "top 25 markets/30 voices" or "failed stations," which include those that are involved in bankruptcy proceedings. In support of the instant waiver request, the applicants state that Dorothy Owens, on October 23, 1989, filed a voluntary petition for bankruptcy under Chapter 11 of the federal Bankruptcy Code, in the United States Bankruptcy Court for the Eastern District of California (Case No. 189-04908B-11K). Applicants have submitted a copy of the bankruptcy petition which shows, as amended, that Dorothy Owens' total assets are $2,409,920 and her liabilities are $3,647,616. The petition was approved by the Court on March 28, 1990.

PLEADINGS

4. The Petitioners first allege that Dorothy Owens did not sever her business relationship with Buck Owens Production in accordance with the condition placed on the construction permit for KDOB-TV, Bakersfield, when it was granted to her. *See Memorandum Opinion and Order*, MM Docket No. 85-267, FCC 86M-3052 (released October 1, 1986).[2] As evidence of the continuing business relationship, KGET relies on the financing, leasing and advertising arrangements between Dorothy Owens, KDOB-TV and Buck Owens Production. KGET asserts that Buck Owens, the president and sole stockholder of Buck Owens Production and Dorothy Owens' brother, secretly guaranteed a $1.5 million loan for Dorothy Owens from the Union Bank which allegedly allowed him to obtain *de facto* control of the operation of KDOB-TV. KGET contends that the failure of Dorothy Owens to notify the Commission of Buck Owens' personal guarantee and apparent involvement in KDOB-TV's operations constitutes misrepresentation and lack of candor on her part and warrants a hearing. Burnham further notes that Buck Owens Production requested and was granted authority by the Commission to move its radio operations to a new 20,000 square foot main studio located outside Bakersfield. Burnham maintains that construction of this larger studio was intended to house KDOB-TV, when it was acquired by Buck Owens Production. Burnham and KGET assert that the radio stations' old main studio was leased by Buck Owens Production to Dorothy Owens for use by KDOB-TV, and that the lease included an arrangement where Buck Owens Production would receive advertising time on KDOB-TV, in lieu of receiving monthly rent of $3,073.50. KGET also contends that Buck Owens Production traded with KDOB-TV for an unspecified amount of advertising in its publications, namely, *The Kern Shopper*, *Camera Ads* and *Home Preview*.

5. In her opposition, Dorothy Owens submits a letter dated January 30, 1985, from Crocker National Bank (later acquired by Wells Fargo Bank), Bakersfield, California, expressing its willingness to lend her $2,000,000 for the construction of her proposed station, in exchange for a security interest in all station equipment. She notes that she invested $803,389 of her own money in prosecuting the application for the construction permit application. In November 1987, she retained Miller, Kaplan, Arase & Co. which prepared financial projections and estimated the total financing for her proposed station to be $3,000,000. She states that she presented these projections to banks in Bakersfield for financing to construct the station and commence its operation. She represents that in April 1988, Wells Fargo Bank extended a $1,500,000 line of credit to her based on her financial statement and secured by the television station's assets. When this financing proved to be inadequate, Dorothy Owens states that she then applied to the Bakersfield office of the Union Bank for an additional loan. She states that, because her assets were already pledged to Wells Fargo Bank, Union Bank would make the $1,200,000 loan only if Buck Owens

provided a personal guarantee. She maintains that this was the first instance where a personal guarantee was specified and required by a financial institution. Although reluctant to ask her brother for the guarantee, Dorothy Owens contends that he was her last resort because all of her efforts had failed, and she had already invested most of her life's savings in obtaining the construction permit. In September 1988, Buck Owens executed the personal guarantee.

6. Dorothy Owens disclaims that either she or Buck Owens have, in any way, been involved in decisions affecting the management and operation of the others' respective broadcast stations, or conducted other than arm's-length business transactions. In her affidavit, Dorothy Owens attests that since her resignation from Buck Owens Production on November 30, 1988, she has had no involvement whatsoever in the management and operation of that company or its radio stations, nor has she had any access to the company's proprietary records. She also states that plans for the new main studio for Buck Owens Production commenced in 1984, prior to her filing her television application, and did not include space for a television station. To support her argument, Dorothy Owens submitted an affidavit from Chris Addington, the architect who designed the new studio. Mr. Addington attests that the new studio and planned expansion were designed specifically to contain Buck Owens Production's two radio stations and its publishing businesses, with no consideration ever being given in the design plans to house a television station. Dorothy Owens also maintains that she has had only arm's-length business transactions with Buck Owens Production, leasing the studio space for KDOB-TV, and advertising promotions for KDOB-TV on Buck Owens Production's radio stations. She asserts that her agreement to provide Buck Owens Production airtime on KDOB-TV to advertise its radio stations, instead of her paying rent, constitutes a "trade-out", which is recognized industry wide as a legitimate business practice. She also documents that she has traded out advertising with several other radio stations in the Bakersfield market, and charged these stations the same rates as she charged KUZZ(AM) and KUZZ-FM.

7. In its reply, Burnham contends that, regardless of the reasons given by Dorothy Owens, she, nonetheless, violated the explicit condition imposed on the construction permit for KDOB-TV by failing either to inform the Commission or to seek its approval before obtaining the personal guarantee of her brother to secure the Union Bank loan. Burnham claims that this condition is as equally binding on Dorothy and Buck Owens as are the Commission's rules, and that their violation of the condition is tantamount to a violation of the Commission's rules and policies. Burnham also alleges that the existence of the personal guarantee was intentionally concealed from the Commission and others by Dorothy and Buck Owens until its disclosure in the bankruptcy proceeding.

8. Burnham also contends in its reply that Dorothy Owens perpetrated a fraud upon the Commission to obtain the authorization for KDOB-TV by falsely certifying that she was financially qualified when she applied for the construction permit. Burnham alleges that the affidavit of Dorothy Owens shows that she had not developed a business plan, which calculated the costs to construct and initially operate KDOB-TV, before she applied, in 1985, for the construction permit and certified her financial qualifications. In the absence of specific cost estimates, Burnham contends that the January 1985 letter from Crocker National Bank to Dorothy Owens concerning a $2 million loan is meaningless, and the certification by Dorothy Owens that she was financially qualified is patently false. Burnham further infers from Dorothy Owens' declaration that her first genuine effort to calculate the necessary funding for the start-up of KDOB-TV was in 1987, when the accounting and consulting firm she retained determined that $3 million was needed to build and operate her proposed station. Burnham reasons that Dorothy Owens' failure to ascertain the start-up financing required for KDOB-TV before filing her application constitutes misrepresentation of her financial qualifications to the Commission.

DISCUSSION

Condition On Construction Permit For KDOB-TV

9. We disagree with Petitioners' interpretation of the condition placed on the original construction permit for KDOB-TV. Petitioners' broad characterization of the condition ignores the narrow legal context within which the condition was imposed, namely, to ensure Dorothy Owens' compliance with our multiple ownership rules. The fundamental purpose of the multiple ownership rules, 47 C.F.R. Section 73.3555, is to promote diversification of ownership in order to maximize diversification of program and service viewpoints as well as to prevent undue concentration of economic power contrary to the public interest. *Amendment of Multiple Ownership Rules (Docket No. 8967)*, 18 FCC 288, 291-92 (1953). In determining cognizable interests, we recognized the actual day-to-day control and potential influence wielded by officers and directors over a corporate licensee, and brought these corporate officials within the purview of the multiple ownership rules. *Id.* at 293. Note 2(h) to Section 73.3555 of our Rules specifically provides, in pertinent part, that officers and directors of a broadcast licensee are considered to have a cognizable interest in the entity with which they are so associated. This rule takes cognizance of the interests any officer or director applying for a license has in other stations so that a determination can be made whether these interests contravene our multiple ownership rules. As applied to the case of Dorothy Owens, when her application for the Bakersfield television channel was being considered in comparative hearing, she also held the positions of officer and director of Buck Owens Production, licensee of radio stations in Bakersfield, and was actively managing the company's business affairs. Outright grant of the construction permit to Dorothy Owens would have been inconsistent with Section 73.3555 because it would have given her cognizable interests in both radio and television broadcast stations in the Bakersfield market. Accordingly, to effectuate compliance with Section 73.3555, a condition ordering Dorothy Owens to divest herself of all her interest in and connection with Buck Owens Production was imposed on the television construction permit granted to her by the Presiding Judge. Our records indicate that Dorothy Owens filed corporate documents which evidence acceptance of her resignation as an officer and director of Buck Owens Production, effective November 30, 1988. Petitioners have not contested the declaration by Dorothy Owens that since her resignation she has not been involved in the management and operation of Buck Owens Production or

its radio stations. Further, we do not believe that the limited, arm's-length transactions between Dorothy Owens and Buck Owens Production constitute an "involvement" or "connection" with the latter, within the meaning of the condition. Thus, Dorothy Owens has fulfilled the divestiture condition consistent with the multiple ownership rules and the terms of the condition. Accordingly, no *prima facie* case that grant of the application would be inconsistent with the public interest on this basis has been presented. See 47 U.S.C. Section 309.

Buck Owens' Interest in KDOB-TV

10. We are also not persuaded, as Petitioners have alleged, that a substantial and material question of fact exists that KDOB-TV may have been under the *de facto* control of either Buck Owens Production or Buck Owens prior to the filing of the instant assignment application. In analyzing Petitioners' allegations, we must first determine whether, assuming that "all the supporting facts alleged in the affidavits are true, would a reasonable factfinder conclude that the ultimate fact in dispute had been established." *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988) *(Astroline)*. If such a *prima facie* case is alleged, the second step is whether, based on the information in the application, all of the pleadings and other matters of which we may take official notice, a substantial and material question of fact is presented. *Astroline*, 857 F.2d at 1561. If so, a hearing must be held.

11. We are presented here with an issue as to actual control *(de facto* fcontrol), not control in law *(de jure* control). Control can include any act which vests in a new entity or individual the right to determine the manner or means of operating the licensee and determining the policy that the licensee will pursue. *WHDH, Inc.*, 17 F.C.C. 2d 856, 863 (1969). In determining whether a person possesses *de facto* control "we are governed chiefly by the demonstration of his power to dominate the management of corporate affairs." *Benjamin L. Dubb*, 16 F.C.C. 2d 274, 289 (1951). Commission precedent establishes that questions as to possible *de facto* control must be decided on a case-by-case basis. *See, e.g., Turner Broadcasting System, Inc.*, 101 F.C.C. 2d 843, 848 (1985). A wide variety of factors may be relevant in reaching a determination. *See generally, William S. Paley*, 1 F.C.C. Rcd. 1025 (1986), *reconsideration denied*, 2 F.C.C. Rcd. 2274 (1987), *aff'd sub nom . Fairness In Media v. FCC*, 851 F. 2d 1500 (D.C. Cir. 1988); and *News International PLC*, 97 F.C.C. 2d 349 (1984). We generally focus our attention on control of finances, programming, personnel and, where appropriate, the selection of corporate board members. With respect to this case, KGET alleges that Buck Owens acquired an undisclosed ownership interest in and *de facto* control of KDOB-TV when he personally guaranteed the Union Bank loan for Dorothy Owens. We do not agree. Contrary to KGET's assertion, we have determined that a debt financing agreement, without more, does not confer a cognizable interest in the holder because no direct influence or control pertains to such financial arrangements. *Multiple Ownership Rules*, 97 F.C.C. 2d 997, 1022 (1984). Nor do we require the filing of short-term or long-term debt instruments under our rules, having found that these financing arrangements have no trappings of influence, are not appropriate for attribution, and therefore, do not warrant reporting. *Id.* at 1031. Only contracts and documents relating to present or future ownership or control of the licensee are required to be filed under Section 73.3613. In that regard, KGET has not supported its allegation with affidavits from persons with personal knowledge that Buck Owens exerted either direct or indirect control over the business activities of KDOB-TV as a result of the personal guarantee. Nor has KGET furnished properly supported allegations that Dorothy Owens failed to operate KDOB-TV independently of her brother, Buck Owens.

12. In cases concerning family relationships where intertwined business relationships also exist, the applicants have the burden of establishing that the station involved is or will be independently owned and operated. *Arnold L.Chase*, 5 F.C.C. Rcd. 1642 (1990) In that connection, numerous affidavits have been submitted, including those of Dorothy Owens, Buck Owens, Mel Owens (general manager of Buck Owens Production's radio stations), and Chris Addington (architect), as well as bankers and other prospective purchasers of KDOB-TV. These affidavits state that Buck Owens was not involved in and played no part in Dorothy Owens' application for KDOB-TV, or the station's planning, initial financing or construction. The affidavits also note that Dorothy Owens severed her relationship with Buck Owens Production prior to the operation of KDOB-TV and that, when additional funds were necessary, Buck Owens only provided a guarantee for the financing, once other possibilities were exhausted. As to trade-out arrangements, Mel Owens attests that the radio stations pay the three network affiliates in the area $60,820 for advertising and would have paid KDOB-TV $54,255, if it were not for the trade-out arrangement. The architect states that at no time during the planning and construction of Buck Owens Production's new facilities was space for a television station operation discussed or considered. In contrast, the petitioners provide no support for their allegations.[3]

13. Where a parent makes a loan to a family member in an arm's-length transaction, a finding of *de facto* control in the parent does not necessarily follow. *High Sierra Broadcasting Co., Inc.*, 96 F.C.C. 2d 423, 435-36 (Rev. Bd. 1983). In this case, unlike *High Sierra*, no loan was made. Instead, we find an arm's-length transaction in which a brother guaranteed a loan to his sister from a bank. We do not conclude from these facts that a substantial and material question of fact exists that Buck Owens was in *de facto* control of the licensee.[4] Similarly, we find that the trade-out arrangement between Dorothy Owens and Buck Owens is a common practice in the broadcast industry and, in this instance, does not raise a real-party-in-interest issue. *See, e.g., Angeles Broadcasting Network*, 61 R.R. 2d 480, 488 (1986); *Kaye-Smith Enterprises*, 71 F.C.C. 1402, 1407 (1979). This issue will be considered only upon a showing that a person has an ownership interest or is or will be in a position to actually or potentially control the applicant. *High Sierra Broadcasting, Inc., supra* at 435. We find that neither KGET nor Burnham have provided any support for their conclusionary allegations on this issue and therefore have not made a *prima facie* case. Even if they had, however, the numerous, specific affidavits from persons with first-hand knowledge of the facts submitted by the applicants amply support the conclusion that no substantial and material question of facts exists on the *de facto* control issue.

False Financial Certification

14. Burnham contends that Dorothy Owens falsely certified that she was financially qualified to construct KDOB-TV when she filed her application because she had failed to ascertain, in advance of filing, the actual cost estimates required for start-up financing. Burnham points in this regard to Dorothy Owens' own assertions that she obtained actual costs estimates for construction and operation of KDOB-TV in 1987, after the grant of her construction permit. The application form (FCC Form 301) filed by Dorothy Owens on February 22, 1985, then required every applicant to certify that "sufficient net liquid assets are on hand or are available from committed sources to construct and operate the requested facilities for three months without revenue." In that regard, Burnham is correct in stating that projected construction and operating costs must be determined. As to those costs, Dorothy Owens states in her affidavit: "Before I filed my application I had discussed my plans with Crocker National Bank ... The bank told me that it would favorably consider making me a loan for my construction and start-up costs if my application were granted ... As a result, I believed that the necessary financing would be available to me...." The clear implication of the quoted language is that before filing her application, Dorothy Owens had discussed a loan with the bank to meet estimated costs. Indeed, subsequently, the Crocker National Bank issued a letter, dated January 30, 1985, which addressed the particulars of the proposed financing, including the loan amount, interest rate, terms of repayment and security. It appears, therefore, that the bank was sufficiently satisfied with Dorothy Owens' overall business plan to provide reasonable assurance of financial support for her station construction and operating efforts. It is also noteworthy, in this regard, that Dorothy Owens did, in fact, ultimately construct and operate KDOB-TV for approximately four months before seeking the infusion of additional outside financing in April 1989. Thus, we find no substantial and material question of fact regarding possible misrepresentation. The language quoted by Burnham refers to plans made after issuance of the construction permit for KDOB-TV. As the Commission noted in *Revision of Form 301*, 50 R.R. 2d 381, 382 (1981), "[i]t is our experience that a proposed operation is rarely effectuated exactly as ..." originally proposed. We view Dorothy Owens' post-grant discussions, as noted by Burnham, to involve such a modification of plans, not as an indication that she lacked cost estimates at the time she initially certified to her financial qualifications. *See KRPL, Inc.*, 5 F.C.C. Rcd. 2823 (1990). In the absence of more specific allegations of fact from Burnham on this point, we find no substantial and material question of fact warranting a hearing regarding misrepresentation in connection with the original cost estimates.

THE WAIVER REQUEST

15. The Petitioners allege that the filing of the bankruptcy petition by Dorothy Owens is a subterfuge to obtain a waiver of the Commission's cross-ownership rule under its "failed station" standard, so that Buck Owens Production can acquire KDOB-TV. Petitioners made several contentions to support their conclusion that protection of the bankruptcy laws is not needed. We find that these arguments do not raise a *prima facie* case that grant of the waiver request would be inconsistent with the public interest. In essence, the petitioners are asking us to review the wisdom of the court as to the need for the bankruptcy proceeding. This we decline to do.[5] *See LaRose v. F.C.C.*, 494 F.2d 1145, 1146-47 n.2. (D.C. Cir. 1974). What we will address, briefly, is the allegation that the station was intentionally operated so as to go bankrupt to establish a "failed station." In this connection, Burnham alleges that Dorothy Owens deliberately undercapitalized the financing of KDOB-TV by obtaining only enough bank financing to construct and operate KDOB-TV for a few months, so that she would be able to declare bankruptcy shortly after commencing broadcast operations. Burnham's contention is based upon speculation inferred from KDOB-TV's current financial plight and Dorothy Owens' solicitations of additional loans to operate the station.

16. We find Burnham's contentions to be purely speculative. Moreover, even if they were sufficient to establish a *prima facie* case, our review of the record leads us to conclude there is no substantial and material question of fact regarding this matter. We already have determined that either no *prima facie* or substantial or material question of fact has been raised that Dorothy Owens misrepresented her financial qualifications in obtaining the construction permit for KDOB-TV. The unrefuted affidavit submitted by Dorothy Owens, as well as the affidavits of others, establish that she made every effort to create a successful broadcast venture. She conceived the venture, she applied for the facility, and she spent a good portion of her life's savings in order to obtain the construction permit. When the station ran into financial difficulty, she contacted numerous financial sources in an effort to raise money. She even sold off personal assets in an effort to save the station. Additionally, unrefuted exhibits in the record show that Dorothy Owens approached at least nine different individuals and invited them to join her as owners of the station in return for capital investment. Only, after all else failed, and upon the advice of a communications consultant, did Dorothy Owens make the decision to sell the station. She then authorized the consultant to initiate discussions with a prospective buyer, Riklis Broadcasting. She and Riklis did not reach an agreement, although she gave Riklis all of KDOB-TV's confidential financial data and engaged in negotiations with Riklis for more than five weeks.[6] In the later part of September 1989, in a desperate cash situation, unable to raise additional capital, and facing severe demands from creditors, the possibility of a sale to Buck Owens Production was raised by her communications counsel. Buck Owens, in his affidavit, states that up to that point he was not even aware that he could acquire the station under the FCC's rules. Mr. Owens further states that at no prior time had he and Dorothy Owens discussed his acquiring KDOB-TV, nor had he previously ever had any understanding, spoken or unspoken, with respect to KDOB-TV. On October 23, 1989, Dorothy Owens filed a voluntary petition for bankruptcy. Thereafter, on November 1, 1989, negotiations between Dorothy Owens and Buck Owens culminated in the execution of the Asset Purchase Agreement.

17. The record in this case does not raise any substantial and material questions of fact that Dorothy Owens did not make every effort to save her station and that she reluctantly turned to Buck Owens as a last resort. We recently stated that, as a general matter, a business person may be willing to accept start-up losses, based on the hope

that profits will result in the future. We reasoned that, if the marketplace is to work freely, we must expect wide variations in business judgments as to how best to create an economically viable enterprise and are very reluctant to second guess broadcasters in that regard. *Arnold L. Chase, supra* at 1646. Dorothy Owens has made a decision that she is not willing to risk additional losses on the hope that KDOB-TV may some day become profitable. We will not question that judgment. Thus, from the information before us we can not find that Dorothy Owens deliberately undercapitalized the financing of KDOB-TV with the intention of creating a "failed station."

18. Additionally, Burnham and Pappas allege that ownership of KDOB-TV by Buck Owens Production will substantially reduce the level of competition and diversity in the Bakersfield broadcast market, and will allow Buck Owens to dominate it to the detriment of the public interest. In her response, Dorothy Owens states that Bakersfield is ranked as the 145th largest television market and that its area of dominant influence is served by four licensed and operating television stations (including KDOB-TV) and 26 licensed and operating radio stations (including those operated by Buck Owens Production). In adopting *Amendment of Section 73.3555*, above, we stated that we were predisposed to granting such waivers which would either allow a station that has not operated for a long period to resume service or allow a station that is involved in bankruptcy to continue. We also determined that joint ownership would not adversely affect our goals of diversity and competition under these circumstances. We concluded that, once a station ceased operation or became involved in bankruptcy, competition and diversity could not be improved by forbidding joint ownership, and that dark or bankrupt stations disserve these goals because the stations hold valuable frequencies without furnishing service to the community. *Id.* at 1752-53. In view of the circumstances presented here, we find that a waiver of the rule would be in the public interest.

19. Further, we note Pappas' concern that we not blindly follow the policy of accommodating bankruptcy court decisions when a waiver would provide the purchasers with an overwhelming share of the broadcast market. *LaRose v. F.C.C.*, supra. This will not occur here. The record demonstrates that numerous stations serve the Bakersfield market providing it with substantial diversity and competition.

20. Finally, we have examined Burnham's and Pappas' allegation that Dorothy Owens failed to find a buyer for KDOB-TV who conforms with our multiple ownership rules. The record establishes that she did seek out other buyers. Riklis Broadcasting states that it is still interested in buying the station. Its proposal, however, imposes an onerous obligation on Dorothy Owens to repurchase the station in two years, at Riklis' option, no matter how good or bad a business venture that might then be. We cannot fault Dorothy Owens for declining to accept such an offer.[7]

CONCLUSION

21. Accordingly, IT IS ORDERED, That the petitions to deny filed by Burnham Broadcasting Company, a Limited Partnership, KGET TV, Inc., and Pappas Telecasting Incorporated, ARE DENIED.

22. IT IS FURTHER ORDERED, That the request for a permanent waiver of the Commission's cross-ownership rule, Section 73.3555(b), IS GRANTED; and, having found the applicants fully qualified, the above-captioned application (BALCT-891109KI) for consent to the assignment of license of station KDOB-TV, Bakersfield, California, from Dorothy J. Owens, Debtor-in-Possession to Buck Owens Production Company, Inc., IS GRANTED, effective on the date of adoption.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] McGraw-Hill Broadcasting Company, Inc., licensee of KERO-TV, Channel 23, Bakersfield, California, filed comments supporting the allegations raised in the three petitions to deny.

[2] In that proceeding, six applicants applied for Channel 48, Bakersfield, California, and their applications were designated for hearing in mid-1985. One of the applicants filed a petition which sought a ruling by the Presiding Judge on the issues of whether Dorothy Owens was acting on behalf of her brother, Buck Owens, and alternatively, whether Buck Owens was the real-party-in-interest to the application of Dorothy Owens. In its petition, the applicants noted that Dorothy Owens was the sister of Buck Owens; that Buck Owens Production was the licensee of four radio stations; that Dorothy Owens had been the officer and director of Buck Owens Production; and that she had actively participated in the management of her brother's company. In response, Dorothy Owens stated that she had disclosed her familial and business relationships with Buck Owens and his company. She also pledged to disassociate herself from Buck Owens Production, and represented that Buck Owens was in no way involved in her application and did not have a present or prospective ownership interest in her proposed television station. In declining to add the requested issue, the Presiding Judge found that the petitioner had engaged in innuendo and speculation and had provided no facts demonstrating that Buck Owens had any involvement in Dorothy Owens' application or that he would be in position to control the operation of her proposed station. *Dorothy J. Owens*, MM Docket No. 85-267, FCC 86M-1971 (ALJ, released June 18, 1986). Thereafter, the five remaining applicants entered into a joint settlement agreement whereby Dorothy Owens agreed to pay the other applicants for dismissing their competing applications. The settlement was granted by the Presiding Judge subject to the condition that:

> Prior to commencement of operation, of the television station authorized herein, permittee shall certify to the Commission that she has divested herself of all interest in and connection with the licensee of stations KUZZ(AM) and KUXX(FM) [now KUZZ-FM] Bakersfield, California.

[3] As noted above in footnote 2, this issue was raised by another applicant in the proceeding for the KDOB-TV construction permit. There, the Administrative Law Judge refused to add this issue because the party raising it had failed to support the addition of a real-party-in-interest issue.

[4] The case before us should be distinguished from our decision in *Arnold L. Chase*. There, we were presented with many properly supported allegations of on-going business relationships between a child and his family and family businesses, some of which did not appear to be arm's-length transactions.

[5] On July 25, 1990, Pappas filed a Further Supplement to its Petition to Deny, to which Dorothy Owens filed an Opposition and Pappas then filed a Reply. Pappas essentially alleges that KDOB-TV is not a "failed station." Pappas notes that Dorothy Owens did not inform the bankruptcy court that she would receive $444,259 in tax refunds, which Pappas claims would nearly satisfy the pre-bankruptcy creditors and make KDOB-TV a profitable station, and that Owens failed to inform the Commission of the station's improved financial condition. We note that, to the extent that station losses have declined, the improvement is due to the advances of capital by Buck Owens Production Company, Inc., used as a set-off against the purchase price, to meet current station operating expenses pending approval of the sale of KDOB-TV. Additionally, we note that the alleged "tax refund" is not a cash disbursement to Dorothy Owens, but is, in fact, nothing more than a tax credit to be used as an offset against future taxes in subsequent years when KDOB-TV shows a profit. As we stated above, the bankruptcy court has already ruled on the validity of Dorothy Owens' bankruptcy petition, and we will not second guess the court's decision.

[6] Dorothy Owens represents that negotiations proved unsuccessful in light of Riklis' insistence on a two-year option, which would have required her to repurchase KDOB-TV and reassume its obligations.

[7] In any event, Section 310(d) of the Act precludes us from looking beyond the proposed buyer, in assignment and transfer applications, in determining whether the public interest would be served by a grant of the subject application. Thus, our public interest finding will be based solely on consideration of the qualifications of Buck Owens Production. *See, e.g., McAlister Television Enterprises, Inc.*, 60 R.R. 2d 1379, 1385 (1986).

Dissenting Statement
of
Commissioner Ervin S. Duggan

In Re: Application to assign the license of station KDOB-TV, Bakersfield, Ca.

Although the applicants in this case may, on purely legal and technical grounds, have met the Commission's criteria for a waiver of the radio-TV cross-ownership rule, this case features so many malodorous coincidences and such highly suspicious circumstances that I'm reminded of Groucho Marx's famous line when he played a husband caught in extramarital *flagrante delicto:* "Who are you going to believe--- me, or your own eyes?" I therefore dissent.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-532

In the Matter of

Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations. (Sheldon, Iowa, and Jackson and Springfield, Minnesota)	RM-7199

NOTICE OF PROPOSED RULE MAKING AND ORDERS TO SHOW CAUSE

Adopted: October 25, 1990; Released: November 9, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Sheldon Broadcasting Company, Inc. (petitioner), requesting the substitution of Channel 287C2 for Channel 288A at Sheldon, Iowa, and the modification of its license for Station KIWA-FM to specify the higher powered channel. To accommodate the allotment at Sheldon, petitioner also requests the modification of Station KRAQ's license by substituting Channel 289A for Channel 287A at Jackson, Minnesota, and the modification of Station KLPR's construction permit by substituting Channel 234A for Channel 289A at Springfield, Minnesota. Petitioner states that it will apply for Channel 287C2 if allotted to Sheldon. Petitioner also states its willingness to reimburse the licensee of Station KRAQ and the permittee of Station KLPR for the reasonable costs associated with the change in their respective operating channels.

2. We believe the public interest would be served by proposing the substitution of Channel 287C2 for Channel 288A at Sheldon, Iowa, since it could provide the community with a wide coverage area FM service. Channel 287C2 can be allotted to Sheldon in compliance with the Commission's minimum distance separation requirements and can be used at Station KIWA-FM's transmitter site. Channel 289A can be allotted to Jackson, Minnesota, in compliance with the Commission's minimum distance separation requirements and can be used at the transmitter site of Station KRAQ. Channel 234A can be allotted to Springfield, Minnesota, in compliance with the Commission's minimum distance separation requirements and can be used at the transmitter site of Station KLPR.[1] As requested, we also propose to modify petitioner's license for Station KIWA-FM to specify Channel 287C2. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of the channel at Sheldon or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Sheldon, Iowa	288A	287C2
Jackson, Minnesota	287A	289A
Springfield, Minnesota	289A	234A

4. Accordingly, IT IS ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, Jackson Broadcasting Co., licensee of Station KRAQ, Channel 287A, Jackson, Minnesota ("KRAQ"), and James Ingstad Broadcasting, Inc., permittee of Station KLPR, Channel 289A, Springfield, Minnesota ("KLPR"), SHALL SHOW CAUSE why their authorizations SHOULD NOT BE MODIFIED to specify operation on Channels 289A and 234A, respectively, as proposed herein instead of their presently authorized Channels 287A and 289A, respectively.

5. Pursuant to Section 1.87 of the Commission's Rules, KRAQ and KLPR may, not later than **December 31, 1990**, file written statements showing with particularity why their license or construction permit should not be modified as proposed in the *Order to Show Cause*. The Commission may call on KRAQ and/or KLPR to furnish additional information. If KRAQ and/or KLPR raise a substantial and material question of fact, a hearing may be required to resolve such a question pursuant to Section 1.87. Upon review of the statements and/or additional information furnished, the Commission may grant the modification, deny the modification, or set the matter of modification for hearing. If no written statement is filed by the date refered to above, KRAQ and/or KLPR will be deemed to have consented to the modification as proposed in the *Order to Show Cause* and a final *Order* will be issued by the Commission, if the above-mentioned channel modification is ultimately found to be in the public interest.

6. IT IS FURTHER ORDERED, That the Secretary SHALL SEND, BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Notice of Proposed Rule Making and Order to Show Cause* to the licensee of Station KRAQ and the permittee of Station KLPR, as follows:

Jackson Broadcasting Co.
Station KRAQ
P.O. Box 29
Jackson, Minnesota 56143

James Ingstad Broadcasting, Inc.
Station KLPR
2302 - 15th Street, South
Fargo, North Dakota 58103

7. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

8. Interested parties may file comments on or before **December 31, 1990,** and reply comments on or before **January 15, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Mark E. Fields, Esq.
Miller & Fields, P.C.
P.O. Box 33003
Washington, D.C. 20033
(Counsel to petitioner)

9. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

10. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 287C2 at Sheldon are North Latitude 43-11-00 and West Longitude 95-52-05. The coordinates for Channel 289A at Jackson are North Latitude 43-37-42 and West Longitude 94-59-12. The coordinates for Channel 234A at Springfield are North Latitude 44-14-13 and West Longitude 95-06-20.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-533

In the Matter of

Amendment of Section 73.202(b), RM-7529
Table of Allotments,
FM Broadcast Stations.
(Florence, Oregon)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 26, 1990; Released: November 9, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Coast Radio Broadcasting, Inc. (petitioner), requesting the allotment of Channel 295A to Florence, Oregon, as the community's second local FM service. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by seeking comments on the allotment of Channel 295A to Florence, Oregon, since an interest has been expressed in providing the community with its second local FM service. Channel 295A can be allotted to Florence in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Florence, Oregon	284C	284C, 295A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **December 31, 1990,** and reply comments on or before **January 15, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Jon Thompson
Coast Broadcasting Co., Inc.
1231 18th Street
P.O. Box 20000
Florence, Oregon 97439

Duane J. Polich
P-N-P Broadcasting, Inc.
P.O. Box 2869
Othello, Washington 99344
(Consultant to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It

should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 295A at Florence are North Latitude 43-58-06 and West Longitude 124-06-30.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-103

In the Matter of
Amendment of Section 73.202(b), RM-7174
Table of Allotments,
FM Broadcast Stations.
(Mt. Pleasant, Iowa)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 26, 1990; Released: November 9, 1990

By the Assistant Chief, Policy and Rules Division:

1. At the request of KILJ, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 1580 (1990), proposing the substitution of Channel 288C3 for Channel 288A at Mt. Pleasant, Iowa, and the modification of its license for Station KILJ to specify operation on the higher powered channel. Petitioner and Susan I. Coloff ("Coloff") filed comments. Petitioner filed reply comments.

2. Petitioner reiterates its intention to apply for Channel 288C3, if allotted. It states that Mt. Pleasant, with a population of 7,322 persons, serves as the trading center for a large agricultural area. Petitioner contends that the increase in power is needed in order to serve the programming needs of the farming community and to provide for the dissemination of emergency information.

3. Coloff does not oppose the upgrading of Station KILJ to Class C3 status. However, she requests that Channel 281C3 be allotted to Mt. Pleasant instead of the proposed Channel 288C3 in order to resolve conflicting requests in MM Docket 89-521. *See* 4 FCC Rcd 8204 (1989) and counterproposals thereto. In MM Docket 89-521, Coloff, permittee of Station KMCH, Manchester, Iowa, seeks the substitution of Channel 234C3 for Channel 234A at Manchester and the modification of her permit to specify the Class C3 allotment. Her request conflicts with the pending request of K to Z, Ltd., to allot Channel 249C3 to Lancaster, Wisconsin, by substituting Channel 271A for Channel 236A at Morrison, Illinois, and substituting Channel 249A for Channel 234A at Clinton, Iowa.[1]

4. Petitioner, in reply, states that it would prefer that Channel 288C3 be allotted to Mt. Pleasant. However, should the Commission deem it necessary to allot Channel 281C3 to Mt. Pleasant, petitioner states that it will accept a modification of Station KILJ's license to the alternate channel, provided suitable transmitter sites are available.

5. We have considered Coloff's proposal and find that there is no sufficiently compelling reason to allot Channel 281C3 to Mt. Pleasant in lieu of Channel 288C3. Coloff's proposed resolution of the conflict in MM Docket 89-521 requires additional channel substitutions at Clinton, Iowa, Ogelsby, Illinois, and Genesco, Illinois, as well as the allotment of Channel 281C3 to Mt. Pleasant. Coloff's resolution pleading in MM Docket 89-521 was filed after October 2, 1989, and therefore the channel allotments must comport with the mileage separation requirements adopted in MM Docket 88-375. *See* 4 FCC Rcd 6375 (1989). A staff review of Coloff's proposal shows that several of the substitute channels cannot be allotted in compliance with the current mileage separation requirements. Thus, there is no reason to allot Channel 281C3 in lieu of Channel 288C3 to Mt. Pleasant with the attendant requirement that petitioner locate a transmitter site different from that specified in the *Notice*.

6. We believe the public interest would be served by substituting Channel 288C3 for Channel 288A at Mt. Pleasant, Iowa, since it could provide the community with a wide coverage area FM service. Channel 288C3 can be allotted to Mt. Pleasant in compliance with the Commission's minimum distance separation requirements with a site restriction of 11.8 kilometers (7.3 miles) southeast to avoid a short-spacing to Station KOKZ, Channel 289C, Waterloo, Iowa, and to the proposed allotments of Channel 288C3 at Chariton, Iowa (MM Docket 89-264), and Channel 291A at Washington, Iowa (MM Docket 89-451).[2] As proposed, we will also modify petitioner's license for Station KILJ to specify operation on Channel 288C3 in compliance with Section 1.420(g) of the Commission's Rules.

7. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 24, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Mt. Pleasant, Iowa	288C3

8. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of KILJ, Inc., for Station KILJ, Mt. Pleasant, Iowa, IS MODIFIED to specify operation on Channel 288C3, in lieu of Channel 288A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

9. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

10. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Public Notice of Coloff's counterproposal in MM Docket 89-521 was given on February 6, 1990, Report No. 1807.

[2] The coordinates for Channel 288C3 at Mt. Pleasant are North Latitude 40-54-04 and West Longitude 91-26-21.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-286

In the Matter of

Amendment of Section 73.202(b), RM-7285
Table of Allotments,
FM Broadcast Stations.
(Woodward, Oklahoma)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 29, 1990; Released: November 9, 1990

By the Assistant Chief, Policy and Rules Division:

1. At the request of Fuchs Communications, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 3317 (1990), proposing the substitution of Channel 261C1 for Channel 228A at Woodward, Oklahoma, and the modification of its license for Station KWFX to specify the non-adjacent, higher powered channel. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 261C1 for Channel 228A at Woodward, Oklahoma, since it could provide the community with an additional wide coverage area FM service. Channel 261C1 can be allotted to Woodward in compliance with the Commission's minimum distance separation requirements with a site restriction of 12.2 kilometers (7.6 miles) southwest of the community to accommodate petitioner's desired transmitter site.[1] As proposed, we will modify the petitioner's license for Station KWFX to specify operation on Channel 261C1 in lieu of its present Channel 228A. We will not allot Channel 292C1 to Woodward, which was proposed as an additional equivalent class channel for use by other interested parties, since no interest in use of the channel was expressed.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 24, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Woodward, Oklahoma	221C3, 240A, 261C1, 266C, 272A

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Fuchs Communications, Inc., for Station KWFX, Woodward, Oklahoma, IS MODIFIED to specify operation on Channel 261C1, in lieu of Channel 228A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 261C1 are North Latitude 36-20-40 and West Longitude 99-28-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-584

In re Applications of

EDWIN A. BERNSTEIN	File No. BPH-870330NC
RADIO CENTER MORICHES LIMITED PARTNERSHIP	File No. BPH-870331MV
DAKK, INC.	File No. BPH-870331ND
FRIENDSHIP COMMUNICATIONS, LTD.	File No. BPH-870415KS
HAMPTONS COMMUNICATIONS LIMITED PARTNERSHIP	File No. BPH-870415KY

For Construction Permit for a New FM Station on Channel 241A at Center Moriches, New York

Appearances

Dennis J. Kelly, on behalf of Edwin A. Bernstein; *Howard M. Liberman* and *Gerald Stevens - Kittner*, on behalf of Radio Center Moriches, a Limited Partnership; *David Honig* and *Thomas Hart, Jr.* on behalf of DAKK, Inc.; *Thomas L. Siebert* and *Paul C. Besozzi* on behalf of Friendship Communications, Inc.; *Lewis I. Cohen* and *John J. Schauble*, on behalf of Hamptons Communications Ltd. Partnership; and *Gary P. Schoman*, on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE EDWARD LUTON

Issued: October 29, 1990; Released: November 13, 1990

I. PRELIMINARY STATEMENT

1. By *Hearing Designation Order*, (DA 88-1944), released January 26, 1989, the Mass Media Bureau designated the applications in this case for hearing. Five applicants remain.[1] Hearing sessions on the standard comparative issues were held on August 7 through 11, 1989.[2] By *Order*, FCC 90M-86, released January 16, 1990, the presiding judge ordered the filing of proposed findings of fact and conclusions of law on the standard comparative issues by March 15, 1990, and reply proposed findings by April 5, 1990.

II. FINDINGS OF FACT

Edwin A. Bernstein

2. Bernstein is an individual applicant proposing to operate as a sole proprietorship. Bernstein Ex. 1.

3. Bernstein has no ownership interest in any medium of mass communications. At the present time, and until 1991, Bernstein receives a consulting fee of $2,250 per year from station WOLF (AM), Syracuse, New York; Bernstein testified that the consulting agreement was "part of the package" when his group sold that station eight years earlier and that he had not performed consulting service for WOLF (AM). Tr. 79-80.

4. In the event his application is granted, Bernstein would be employed at his proposed Center Moriches station as General Manager, devoting a minimum of 40 hours per week (full time), on a day to day basis to his duties. As General Manager, Bernstein will be in charge of all aspects of the day to day operation of the station, including programming, sales, business affairs and technical operations. He will have ultimate decision making authority over the station, will make all financial decisions, and will make all hiring and firing decisions (*Id.*, pp. 1-2).

5. At the present time, Bernstein is a practicing attorney at law, in the firm of Katz and Bernstein, Rockville Center, New York. In the event his application is granted in this proceeding, Bernstein will leave the practice of law in order to be able to work full time at the station. He will retire from the Katz and Bernstein partnership, and his clients will be handled by his present law partner and the three associate attorneys now employed by Katz and Bernstein.

6. Bernstein does not now reside within the service area of the proposed station, but he will locate there, if his application is granted.

7. From 1956 to 1980 Bernstein was associated with a broadcast group known as Regional Broadcasters which, at various times, was connected with ten broadcast stations. Each station was owned by a separate licensee corporation but certain functions were carried out by Regional centrally. Tr. 37. From 1957-66, Mr. Bernstein was vice-president, secretary and/or treasurer of each of the Regional group's licensee corporations, and was responsible for legal and financial matters. In 1966, he became vice-president and general manager of the Regional group. He retired from the Regional group in July, 1980. Bernstein Ex. 1.

8. During his employment with Regional, Mr. Bernstein was the on-site general manager of WKNY, Kingston, New York, for six months in 1966. Tr. 38. He devoted approximately 25 to 30 hours per week to those duties. Tr. 38-39.

9. Bernstein proposes to install auxiliary power to ensure continued operation of the proposed Center Moriches station in the event of commercial power outage (Bernstein Ex. 2).

Radio Center Moriches

10. Radio Center Moriches is a limited partnership with three general partners, each of whom has a one third vote in the affairs of the partnership. Each general partner holds a one-fourth equity interest in the partnership. The general partners are Marc M. Weissman, Richard H. Weissman and Rhea Morgan Burrow, Jr. Radio Center Moriches, Ex. 1. There is one limited partner, Ananda De Silva. Mr. De Silva holds a one-fourth equity interest in the partnership and no voting rights. He will have no material involvement in the day-to-day management or operation of the proposed station and will have no involvement in the management or affairs of Radio Center Moriches. *Id.*; Radio Center Moriches Ex. 7, p. 5.[3]

11. Neither Radio Center Moriches nor any of its partners has any interest, direct or indirect, in any medium of mass communications. Radio Center Moriches Ex. 2.

12. Marc M. Weissman intends to work full time, at least forty hours per week, as the station's general manager. He will exercise overall supervision of all facets of the management and operation of the station and perform those duties ordinarily associated with the position of general manager of a radio broadcast station. Radio Center Moriches Ex. 3, p. 1. His duties will include input and supervision regarding the station's programming, marketing, financial management, community service, personnel policies, hiring and termination of employees, and the implementation of the station's equal employment opportunity program. He intends to perform these functions in cooperation with the other general partners.

13. Mr. Weissman currently has his own law practice in Englewood, New Jersey. He intends to turn over the vast majority of his practice to one or more other lawyers and devote no more than ten hours per week to his law practice, in order to be able to devote himself on a full-time basis to his duties as general manager of the station. Mr. Weissman has discussed his plans on several occasions with another attorney, Martin Sharit, and has an oral agreement with Mr. Sharit that Mr. Sharit will take over much of his legal work. Tr. 117. Mr. Sharit already performs such duties when Mr. Weissman is away from the office. Tr. 117.

14. Mr. Weissman currently resides in Montclair, New Jersey. Radio Center Moriches Ex. 3, p. 1. If the application of Radio Center Moriches is granted, Mr. Weissman will reside in Center Moriches, within the service area of the station. Radio Center Moriches Ex. 3.

15. From 1970 to 1974, Mr. Weissman served as a disc jockey, announcer, and programming assistant for WVUM (FM), Coral Gables, Florida on a part-time, twenty hour per-week basis.

16. In 1979, Mr. Weissman served as a disc jockey, announcer, and programming assistant for WDON (AM) (now WMDO), Wheaton, Maryland, on a part-time, twenty hour per-week basis.

17. In 1983 to 1986, Mr. Weissman was the host of a one half hour per-week talk show entitled "Money Watch" which was carried by a cable TV system in North Bergen, New Jersey. In addition, Mr. Weissman prepared and announced a five minute weekly financial news summary for the same cable system.

18. In 1981, Mr. Weissman was involved in preparing and announcing a series of one minute spot announcements for WRKS-FM, New York, New York.

19. Richard H. Weissman intends to work full time, at least forty hours per-week, in the day-to-day management and operation of the station as its sales manager. Radio Center Moriches Ex. 4. Mr. Weissman will exercise overall supervision of all facets of the station's sales and marketing efforts. He will perform those duties ordinarily associated with the position of sales manager of a radio station. In addition, he will participate with the other general partners in the overall supervision of the station's programming, financial management, community service, personnel policies, hiring and termination of employees, and the implementation of the station's equal employment opportunity program.

20. Mr. Weissman currently is a sales vice-president with Roth-Paris Marketing, Inc., an independent manufacturer's representative of consumer electronic equipment. He previously owned his own advertising agency and purchased radio time for clients. Tr. 180. If the application of Radio Center Moriches is granted, he will spend no more than ten hours on matters related to his current occupation so he can devote himself on a full-time basis to his duties as sales manager.

21. If the application of Radio Center Moriches is granted, Mr. Weissman intends to move to Center Moriches, within the proposed station's service area. He currently lives in Commack, Long Island.

22. From 1961 to 1963, Mr. Weissman worked part-time as a disc jockey, announcer and technical operations manager at WFMU-FM, East Orange, New Jersey.

23. Rhea Morgan Burrow, Jr. intends to work full-time, at least forty hours per-week, in the day-to-day management and operation of the station as its Director of Engineering and Operations. Radio Center Moriches Ex. 5. He will exercise overall supervision of all facets of the technical operation of the station. He will supervise construction of the station. Tr. 310. He also will supervise part-time engineering personnel. In addition, he will participate with the other general partners in the overall supervision of the station's programming, marketing, financial management, community service, personnel policies, hiring and termination of employees, and the implementation of the station's equal employment opportunity program.

24. Mr. Burrow is presently employed full-time as a consulting engineer by the firm of Mullaney Engineering, Inc. If the application of Radio Center Moriches is granted, Mr. Burrow will terminate, or reduce as necessary, any conflicting time commitments in order to be able to devote himself on a full-time basis to his duties at the station. Radio Center Moriches Ex. 5.

25. If the application of Radio Center Moriches is granted, Mr. Burrow will move to Center Moriches, within the proposed station's service area. He currently lives in Rockville, Maryland.

26. From 1968 to 1975, Mr. Burrow worked as a part-time engineer at WEAM(AM) (now WMZQ), Arlington, Virginia. From 1975 to 1978, Mr. Burrow served on a full-time basis as the Chief Engineer at WEAM.

27. From 1978 to 1981, Mr. Burrow worked thirty to forty hours per week as a contract engineer with WDON (AM), Wheaton, Maryland, and WJMD (FM) (now WLTT), Bethesda, Maryland.

28. From 1982 to 1983, Mr. Burrow was employed full-time by WEZR(FM) (now WJFK), Fairfax, Virginia, rebuilding the station's transmitter plant. Since 1983, Mr. Burrow has been employed full-time as a consulting engineer with two telecommunications engineering firms.

29. Radio Center Moriches proposes to install auxiliary power generating facilities at its studio and transmitter to enable it to continue operation in the event of a power failure at either or both locations. Radio Center Moriches Ex. 6.

DAKK INC.

30. DAKK is wholly-owned by Craig Foster who is its president and sole stockholder. DAKK Ex. 1. Neither DAKK nor Mr. Foster has an attributable interest in any medium of mass communications. DAKK Ex. 2.

31. Mr. Foster proposes to work at the station full-time, at least 40 hours per week, as general manager. He is a Black American citizen.

32. Mr. Foster is currently employed as Vice-President of RLR Associates, Ltd. and intends to resign that position if DAKK is awarded the station. He is a resident of New Rochelle, New York, but proposes to move to Center Moriches if DAKK is the successful applicant. DAKK Ex. 3.

33. From January 1966 to May 1969, Mr. Foster was a pledgee for WYBC-AM-FM, a student radio station at Yale University. At WYBC, he worked at the AM station, which was a carrier-current station heard only on campus, performing administrative, news reporting, and announcing duties. DAKK Ex. 3.

34. From August 1972 to September 1976, Mr. Foster was employed by the William Morris Agency, Inc., in its Business Affairs Department, mostly as an attorney. He was involved in the negotiation and preparation of contracts, some of which related to television, advertising, music recording, music publication, concert, variety, and agency representation.

35. From September 1976 to November 1978, Foster was the Associate Director, Business Affairs, CBS Sports. He was involved in the negotiation and preparation of contracts in connection with the acquisition of events, programs, production personnel, and on-camera talent for CBS Sports. In November 1978, Mr. Foster became the Director, Business Affairs, CBS Sports where, in addition to the aforementioned duties, he assumed resposibility for all business and administrative matters connected with international sales.

36. From March 1981 to March 1989, Mr. Foster was the Vice-President, Business Affairs and Compliance, CBS Sports. He was responsible for all business and policy matters connected with the operation of the CBS Sports Division.

37. Since March 13, 1989 to the present, Mr. Foster has been the Vice-President of RLR Associates, Ltd., a personnel management and consulting firm specializing in sports television.

38. DAKK, Inc. will utilize auxiliary generators at the studio and transmitter sites in order to supply power in the event of a power failure.

Friendship Communications, Ltd.

39. Friendship Communications, Ltd. is a New York limited partnership. Holly H. Friend, the only general partner, owns twenty percent of the total partnership interest. Warren H. Friend, her husband, is the only limited partner. He owns eighty percent of the total partnership interest. Friendship Ex. 1.

40. Mrs. Friend made an initial capital contribution to the partnership of $100. Tr. 664, 666. Mr. Friend made an initial capital contribution of $5,000 in April 1987. Prior to the designation of Friendship's application for hearing, Mr. Friend had contributed approximately $15,000 toward prosecution of the application. Tr. 671, 687. All funds are capital contributions. Tr. 703.

41. Friendship's agreement of limited partnership provides that the limited partner shall have no role in the management of the radio station and contains other prohibitions on the activities of the limited partner, including a prohibition against the limited partner communicating with the general partner on matters pertaining to the day-to-day operations of the station. Friendship Ex. 2, p. 1.

42. Neither Friendship nor Mr. or Mrs. Friend owns any interest in any medium of mass communications. Friendship Ex. 2, p. 1.

43. Ms. Friend will work full time in the management of the radio station as its General Manager. (Friendship Ex. 3, p. 1; Lefebvre Ex. 7, p. 2). Mr. Friend will have no involvement in the management of the station. (Friendship Ex. 3, p. 1).

44. As General Manager of the station, Ms. Friend will have the primary and ultimate responsibility for all decisions affecting the day-to-day-and long-range operations of the station. (Friendship Ex. 3, p. 1). She will have sole and complete authority over hiring and firing decisions. (Tr. 709). She will also have ultimate authority for all matters involving station programming. (Friendship Ex. 3, p.1). She will be the person responsible for implementation of the station's Equal Employment Opportunity Program. *Id.*

45. Ms. Friend will work a minimum of 40 hours per week at the Center Moriches station. (Friendship Ex. 3, p. 1). To accomplish this, Ms. Friend will resign her current employment with Saatchi & Saatchi, New York, upon grant of the Friendship application. (Friendship Ex. 2, p. 2; Ex. 3, p. 1).

46. Ms. Friend is a resident of New York City, but proposes to move to Center Moriches if Friendship's application is granted. (Friendship Ex. 3, 2; Tr. 714).

47. Holly H. Friend, is female and Friendship claims female ownership enhancement credit.

48. Ms. Friend was raised in Riverhead, New York, which is within the 1 mV/m service contour of the proposed station, and she lived there until October, 1983. She left in the fall of 1983 to attend Pennsylvania State University, returning in May, 1983, upon her graduation to live with her parents. She then moved to New York City in October, 1983. Friendship Ex. 3, 4; Tr. 655.

49. From 1973 until 1979, Ms. Friend was a member of the Riverhead Summer Theater Workshop. (Friendship Ex. 4, p. 4). The Summer Theater Workshop performs at Riverhead Library and travels to summer camps and retirement camps to perform. (*Id.* ; Tr. 720-21).

50. In 1979, Ms. Friend served as a student advisor to the Riverhead Town Board, as a representative of teenagers in the community. (Friendship Ex. 4, p. 40). She participated in discussions and decisions regarding teen activities and development of teen centers in Riverhead. *Id.*

51. From 1976 until 1979, Ms. Friend was a member of Something More in Life Experience ("SMILE"), a community group connected with Mercy High School. (Friendship Ex. 4, p. 5; Tr. 721). As a member of SMILE, Ms. Friend worked as a one-on-one volunteer with the retarded in recreational activities. (Friendship Ex. 4, p. 5). She also taught arts and crafts at a local community center and helped disabled people prepare for the Special Olympics. *Id.*

52. In 1976, Ms. Friend was a staff volunteer for the Childrens Museum of Contemporary Art. (Friendship Ex. 4, p. 5).

53. In 1976, Ms. Friend was a volunteer in the effort to restore The Benjamin House, a circa 1700 building on Main Street, Riverhead. (Friendship Ex. 4, p. 5).

54. Ms. Friend was last actively involved in civic activities in Riverhead in 1979. (Tr. 689).

55. Ms. Friend is currently employed by Saatchi & Saatchi, New York, New York, as an Associate Director. (Friendship Ex. 2, p. 2; Ex. 4, p. 4). She has held that position since October 1985. Her duties include syndicating a variety of television programs and animated strips to program directors and general managers of television stations in 40 television markets.

56. From October 1984 until October 1985, Ms. Friend was a Media Planner/Buyer for Griffin Bacal, Inc., New York City. (Friendship Ex. 4, p. 3). In that capacity, she was responsible for negotiating and buying television and radio time for Hasbro Bradley, Inc.

57. From January until October 1984, Ms. Friend was a Media Buyer for Compton Advertising, New York. (Friendship Ex. 4, p. 3). She had sole authority for buying television and radio time during her last several months at Compton.

58. From May 1983 until January 1984, Ms. Friend was a Sales Assistant for Blair Television, New York City. (Friendship Ex. 4, p. 3). There she worked as a liaison between television stations and advertising agencies in New York.

59. From 1982 until 1983, while attending Penn State University, Ms. Friend was a staff reporter for radio station WDFM, State College, Pennsylvania. (Friendship Ex. 4, p. 3; Tr. 712-13). WDFM is an FM station serving the area and is received over the air. (Tr. 689).

60. During the summer of 1982, Ms. Friend worked approximately 20 hours per week as an intern at Satellite News Channel, Boston, where she assembled regional weather, sports reports and worked as a liasion between anchors and the assignment desk. (Friendship Ex. 4, p. 2; Tr. 719).

61. That summer, Ms. Friend also worked as an assistant to the producer of "Special Series on the Eyewitness News" at WBZ-TV, Boston, the NBC affiliate. (Friendship Ex. 4, p. 2). She worked 40 hours per week at WBZ-TV. (Tr. 720).

62. Ms. Friend worked concurrently at WBZ and Satellite News Channel. (Tr. 720). She received college credit for both internships. (Tr. 690).

63. During the summer of 1981, Ms. Friend worked as an intern for radio station WRIV-AM, Riverhead, New York. (Friendship Ex. 4, p. 2). Her duties there included doing voices for commercials, answering telephones, checking the police blotter and fire department for news, and following news leads. (Tr. 719). She was also responsible for the taping the daily agricultural and stock reports. (Tr. 719).

64. Friendship will install auxiliary power facilities at both its studio and transmitter facilities.

Hamptons Communications Limited Partnership

65. Hamptons is a Delaware limited partnership owned as follows:

Name and Address	Position	Equity Holding
Richard O. Coleman	General Partner	10.00%
Jean Wells	Limited Partner	17.75%
Victor Demming	Limited Partner	8.50%
Samuel T. Allen, Jr.	Limited Partner	8.50%
Samuel B. Taylor	Limited Partner	8.50%
Garvey E. Clarke	Limited Partner	8.50%
Ronald Morris	Limited Partner	8.50%
William Froelich	Limited Partner	8.50%
Robert Nash	Limited Partner	8.50%
Kelly L. and Brenda J. Murphy	Limited Partner	8.50%
Harold David Span	Limited Partner	4.25%

Hamptons Ex. 1.

66. Neither Hamptons nor Mr.Coleman has an interest in any medium of mass communications. (Hamptons Ex. 3, p. 1). However, William Froelich, 8.5% limited partner, is the President, Director and 16.67% stockholder of Clearview Broadcasting Corporation, licensee of WFMV(FM), Blairstown, New Jersey.

67. Mr. Coleman proposes to be the full-time General Manager of the station. (Hampton Ex. 3, p. 2). He will direct all station operations. He will establish and implement station policies. He will hire, fire and supervise personnel. He will oversee the station's programming, sales, technical and administrative operations.

68. Mr. Coleman proposes to reduce his current business commitments to between 5 and 10 hours per week to effectuate his integration proposal. (Hamptons Ex. 3, p. 20). He is currently a principal in Coleman, Schaehrer, Walker Real Estate Group, Westhampton Beach, New York. (Tr. 762). The firm buys, sells and develops land and rehabilitates houses. (Tr. 762). It is the source of his livelihood. (Tr. 763).

69. The Coleman firm also derives income from brokerage activities in association with a brokerage firm, Bennett Brokaw Realty. (Tr. 765, 767). Mr. Coleman is a licensed real estate salesman, although not a real estate broker.

70. Mr. Coleman devotes approximately 35 hours per week to the Coleman firm and 5 hours per week to the Brokaw firm. (Tr. 767). He will reduce his commitment to the Coleman firm. (Tr. 770). The Coleman firm stockholders' agreement does not put a time constraint on Mr. Coleman. (Tr. 771).

71. Mr. Coleman is a Black American. (Hamptons Ex. 3, p. 1).

72. Mr. Coleman resides at 401 Fox Hill Drive, Baiting Hollow, New York. (Hamptons Ex. 3, p. 1). He has resided at this address since May 1986. He has lived within the 1 mV/m service area of Hampton's station since January 1985. *Id.*

73. Mr. Coleman is a member of the Westhampton Beach Lions Club International. He has participated in fundraising for aid to the blind and providing scholarships to local high schools.

74. Mr. Coleman has also raised funds for the Westhampton Chapter of the East End Hope for Hospice, an organization formed to aid terminally ill patients. (Hamptons Ex. 3., p. 2).

75. While attending Beloit College, Beloit, Wisconsin, Mr. Coleman served two semesters as co-host of a Friday evening radio program on WBCR, the Beloit College station. (Hamptons Ex. 3, p. 1).

76. Hamptons will install auxiliary power facilities at its studio and transmitter facilities. (Hamptons Ex. 3, p. 2).

77. The Hamptons application was initiated when communications counsel contacted Ms. Jean Wells and informed her that "there was a window for a license to get a frequency in the Hamptons -- in Center Moriches". (Bernstein Ex. 6, p. 7). She then did "a little research" in order "to find out what the area was, what other stations were in the area," so as to "find out [the] viability of even going forward with filing an application" (*Id.*, pp. 7-8). She then invited friends and co-workers to join her in the application (*Id.*, p. 9).

78. In late winter or early spring of 1987, Ms. Wells contacted Mr. Coleman and informed him that she was organizing a limited partnership and asked Mr. Coleman whether he would be interested in becoming the general partner (Tr.1042,1084). Mr. Coleman had known Ms. Wells less than one year at the time, but she sought him out as the prospective general partner because he was a resident of the Center Moriches area (Tr. 1042; Bernstein Ex. 6, p. 13). Mr. Coleman had never before been involved in the operation of a commercial radio station (Tr. 1010). To learn something about what would be involved in running such an enterprise, Mr. Coleman claims to have sought the advice of two men who owned commercial radio stations, Richard Devlin and James Campbell. All of what he discussed with them is revealed in Coleman's testimony given at hearing:

> Q. What did Mr. Devlin -- what did you say to Mr. Devlin and what did Mr. Devlin say to you concerning station operation and the activities of a general manager?
>
> A. I don't recall exactly, Mr. Boros.
>
> Q. Tell me generally what Mr. Devlin said to you.
>
> A. Basically, hiring, firing. I mean, you're in charge of a radio station and you have to hire people to do certain aspects of the business.
>
> Q. Is that all he said to you?
>
> A. In a nutshell, yes, Mr. Boros.

Tr. 1012-1013.

79. Sometime subsequent to their first conversation about the matter, Wells and Coleman talked again and this time Wells told Coleman that she had organized a group of limited partners and asked him if he could attend a meeting about the application (Tr. 1046). Coleman had earlier expressed an interest in becoming the general partner, but did not attend the meeting (Tr. 1046, 1048). On the day after the meeting, Wells contacted Coleman again and told him that the limited partners wanted him to be the general partner (Tr. 1046-47). Ms. Wells recruited all of the limited partners, and they were all in place when Mr. Coleman joined the partnership (Tr. 1085-86).

80. Ms. Wells suggested to Coleman that he take a ten percent equity share in the partnership in exchange for his services in running partnership affairs (Tr. 1055). Coleman did not attempt to negotiate a different equity percentage for himself; instead, he simply determined that ten percent was "enough." (*Id.*)

81. Ms. Wells recommended communications counsel (Tr. 1014). She told Mr. Coleman that she had "used Mr. Cohen in the past." (Tr.1021). Mr. Coleman never attempted to look for counsel other than Mr. Cohen (Tr. 1019-21). Coleman first met Mr. Cohen on April 14, 1987, the day Coleman signed the application (Tr. 1031). At the time he met Mr. Cohen on April 14, 1987, Mr. Coleman did not know what it would cost to contruct the station or to operate the station (Tr. 1075).

82. As of the time that he testified at the hearing, Mr. Coleman had made no capital contribution at all (Tr. 1135). He has been reimbursed by the partnership for all out-of-pocket expenses that he has incurred (Tr. 1135-36). As of the date of the hearing, Hamptons' limited partners had made $48,000 in capital contributions (Tr. 1135).

83. Mr. Coleman acknowledged that he has no experience in operating or managing a radio station. Nevertheless, he testified that he had no plans to hire a station manager (Tr. 1120), or a program director (Tr. 1160). He has given no thought to whether the station would engage in any market research (Tr. 1161). When asked whether he would hire consultants to assist with the operation of the station, he testified "[p]ossibly sir. As I said, I haven't given that much thought at this particular point in time" (Tr. 1121).

III. CONCLUSIONS OF LAW

Edwin A. Bernstein

84. Mr. Bernstein proposes to be the full-time general manager of his station. If his application is granted, he will leave the practice of law to fulfill his integration commitment. Bernstein is entitled to 100 percent quantitative integration credit.

85. Bernstein does not presently reside within the service area of the proposed station. If his application is granted, however, Bernstein proposes to move to a location within the primary service area of the station. The promise of future residency within the service area slightly enhances Bernstein's integration commitment.

86. From 1956 to 1980 Bernstein was associated with Regional Broadcasters which, at various times, was connected with ten broadcast stations. From 1957 to 1966, Mr. Bernstein was vice-president, secretary and/or treasurer of each of Regional's licensee corporations, and was responsible for legal and financial matters. In 1966, he became vice-president and general manager of Regional. That experience, along with his brief tenure as the general manager of WKNY in Kingston, New York, entitles Bernstein to a slight enhancement credit for broadcast experience. Finally, for the proposal to utilize auxiliary power, Bernstein receives very slight enhancement.

Radio Center Moriches

87. Radio Center Moriches earns 100 percent quantitative integration credit for its proposal to have all three of its general partners working full time in managerial positions at the station. The integration proposal is slightly enhanced by the promise of each of the general partners to move to Center Moriches in the event this applicant receives a grant.[4]

DAKK, Inc.

88. DAKK, which is wholly-owned by its fully integrated principal, Craig Foster, is entitled to 100 percent quantitative integration credit. The integration proposal is substantially enhanced by Mr. Foster's status as a member of a racial minority group. Slight enhancement credit is awarded for Foster's proposal to move to Center Moriches, and slight credit is given for his broadcast experience. DAKK receives very slight enhancement credit for its proposal to utilize auxiliary power.

Friendship Communications, Ltd.

89. Friendship's structure is a limited partnership in which the general partner is the spouse of the limited partner. However, the evidence of record is devoid of indications that Holly Friend, Friendship's general partner, is not in control of the partnership. Friendship is a *bona fide* limited partnership. *Chester Associates*, 62 RR 2d 1315 (Rev. Bd. 1987).

90. Holly Friend will work full time in the management of the radio station as the general manager. Friendship receives 100 percent quantitative integration credit. The integration proposal is moderately enhanced by virtue of the fact that Holly Friend is a female.

91. Ms. Friend's permanent residence until 1983 was within the service area, and she now proposes to return to the service area if Friendship is granted the construction permit. Because of Mrs. Friend's long-time service area residency and the promise of future residency, Friendship receives moderate enhancement of its integration proposal. For Mrs. Friend's participation in service area civic activities, last occurring in 1979, Friendship receives a slight enhancement credit. Holly Friend's broadcast experience enhances the integration proposal very slightly.

Hamptons Communications Limited Partnership

92. The facts do not permit the conclusion that Hamptons is a good faith limited partnership. Mr. Coleman holds only 10 percent of the equity of the partnership; he has contributed no funds to the partnership and is not obligated to do so. Moreover, Mr. Coleman has no meaningful broadcast experience that might make his "services" contribution especially valuable, or that might make more credible the purported willingness of Hamptons' limited partners to cede total voting control to an individual who did not make even a token financial contribution to the partnership.

93. Limited partner Jean Wells knew Mr. Coleman only slightly when she recruited him. The record does not indicate that Coleman knew any of the other limited partners at the time he was recruited. Jean Wells recommended to Coleman that the group she was organizing use her communications counsel, and she suggested that Coleman take a 10 percent equity share in the partnership in exchange for his services in running partnership affairs. Coleman accepted these suggestions without dispute or negotiation.

94. Coleman met communications counsel for the first time on the day he signed the application. At that time, Mr. Coleman did not know what it would cost to construct and operate the proposed station. He had no influence in determining the structure of the partnership, the content of Hamptons' application, or the applicant's financial plan.

95. Mr. Coleman did not attend the applicant's organizational meeting. Nevertheless, it appears that the limited partners had no difficulty in proceeding without him, for on the following day, Coleman was told by Ms. Wells that the limited partners desired Coleman to be their general partner. Wells recruited all of the limited partners, and they were all in place when Coleman joined the partnership.

96. The Commission judges an integration proposal based on the "totality" of the record evidence. *Payne Communications, Inc.*, 61 RR 2d 1323 (Rev. Bd. 1986). The conclusion reached here is that Hamptons is not a good faith limited partnership. It is not credible that a *bona fide* limited partners would entrust their substantial investment exclusively into the hands of an individual hardly known to them. It is also not credible that a reasonable general partner would take on unlimited liability for investors he scarcely knew and *not* seek to negotiate his ownership interest in return for this unlimited exposure. *Poughkeepsie Broadcasting Limited Partnership*, FCC 90R-22, released June 6, 1990. Based on the totality of the record evidence, Hamptons cannot be considered a *bona fide* limited partnership. It can receive no more than a 10 percent integration credit at best.

97. Mr. Coleman's minority status substantially enhances the integration proposal, and his service area residency and civic participation enhance the proposal to a slight-to-moderate degree. Very slight enhancement is awarded for Coleman's broadcast experience and, also, for the applicant's proposal to utilize auxiliary power.

IV. ULTIMATE CONCLUSIONS

98. Each applicant, except Hamptons, receives 100 percent quantitative integration credit. All of the applicants receive very slight enhancement credit for their proposals to utilize auxiliary power.

99. Further with respect to qualitative enhancements, Bernstein and Radio Center Moriches each receives slight enhancements for the promises of future residency and for broadcast experience; they are equal in this analysis.

100. Bernsteins' and Radio Center Moriches' qualitative enhancements are outweighed by those of DAKK and Friendship. As between the latter two, DAKK's substantial

preference for the minority status of its principal is not overcome by the moderate enhancements owing to Friendship for female status and service area residency. DAKK is the preferred applicant herein.

Accordingly, *IT IS ORDERED* that unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion, the application of *DAKK, Inc. (File No. BPH - 870331ND) is Granted*, and the applications of Edwin A. Bernstein (File No. BPH-87033NC), Radio Center Moriches Limited Partnership (File No. BPH-870331MV), Friendship Communications, Ltd. (File No. BPH-870415KS) and Hamptons Communications Limited Partnership (File No. BPH-870415KY) are *Denied*.[5]

FEDERAL COMMUNICATIONS COMMISSION

Edward Luton
Administrative Law Judge

FOOTNOTES

[1] The application of Knight Communications Corp. was dismissed by *Order*, FCC 89M-1354, released May 5, 1989; the applications of Benjamin Macwan, Nanette Markunas, Shinnecock Broadcasting Partnership and Moriches Bay Broadcasting, Inc. were dismissed by *Order*, FCC 89M-1598, released June 5, 1989; the application of Long Island University Radio was dismissed by *Order*, FCC 89M-1817, released July 7, 1989; the application of Gateway Broadcasting was dismissed by *Order*, FCC 89M-2399, released October 3, 1989; the application of Vertical Broadcasting, Inc. was dismissed by *Order*, FCC 89M-2815, released December 21, 1989; The application of the Lefebvre Group was dismissed by *Memorandum Opinon and Order*, FCC 89M-2245, released September 11, 1989, affirmed by *Memorandum Opinon and Order*, FCC 89R-75, released December 6, 1989.

[2] Although the hearing designation order had noted apparent differences in signal coverage, the parties, by Joint Exhibit No. 1, stipulated that there were not significant differences in areas and populations served by the competing proposals. Thus, comparative coverage is no longer an issue in this proceeding.

[3] The applicant began as a general partnership. An agreement of limited partnership was entered into as of June 29, 1989 and Mr. De Silva was admitted as a limited partner. By *Order*, FCC 89M-2167, released August 28, 1989, the presiding judge accepted an amendment of Radio Center Moriches reporting the change in ownership structure. Under the agreement of limited partnership, the equity share of each of the three general partners was reduced from one-third to one-fourth, but their voting interests remained at one-third. Mr. De Silva acquired a 25 percent equity interest with no voting power. *See* Radio Center Moriches Ex. 7; tr. 120.

[4] Expressly not taken into account in awarding this "slight" enhancement for residence is the testimony of Marc Weissman that he has spent approximately one month of weekends each summer for six of the past eight years "vacationing" in the Hamptons, and over the last summer, every other weekend and time during the week (Tr. 92). No case holds that "vacation time" spent in the service area is reflective of the extent to which a person has obtained a knowledge of, or displays an interests, in the service are so as to warrant integration enhancement credit.

[5] In the event exceptions are not filed within thirty (30) days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective fifty (50) days after its release pursuant to Section 1.276 (d) of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of the Applications of

NORRIS SATELLITE COMMUNICATIONS, INC. — File Nos. 54-DSS-P/L-90, 55-DSS-P-90

Application for Authority to Construct, Launch and Operate Communications Satellites in the Ka-Band

In the Matter of the Petition of

NORRIS SATELLITE COMMUNICATIONS, INC. — RM No. 7511

For Amendment of Parts 2 and 25 of the Commission's Rules to Establish a General Satellite Service in the Ka-Band

ORDER

Adopted: November 2, 1990; Released: November 8, 1990

By the Chief, Domestic Facilities Division and Chief, Spectrum Engineering Division:

1. GTE Spacenet Corporation (GTE Spacenet) has filed a motion to consolidate the pleading dates in the above-captioned proceedings. The circumstances are as follows: On July 16, 1990, Norris Satellite Communications, Inc. (Norris) filed with the Commission an application for authority to construct, launch and operate satellites in the Ka-band. Accompanying the application was a petition for Rule Making to reallocate Ka-band frequencies to a General Satellite Service. Norris's applications were placed on public notice on October 3, 1990; the date by which comments or petitions may be filed on the applications is November 8, 1990. Norris's Rule Making petition was place on public notice on October 12, 1990; the date by which comments or oppositions may be filed on the petition is November 13, 1990. GTE Spacenet submits that because the substantive issues raised by Norris's application and petition are interrelated, the pleading dates for both proceedings should be consolidated.

2. We agree that consolidating the filing deadlines in both the application and allocation portions of this proceeding would be helpful and will not delay action on Norris's applications or petition. Therefore, pursuant to Section 0.291 of the Commission's rules on delegations of authority, 47 C.F.R. § 0.291, the date for filing comments or petitions on regarding Norris's applications is extended until November 13, 1990 to comport with the date for filing comments or oppositions to Norris's petition. In addition, the date for filing replies to the November 13 filings is extended until December 3, 1990. Finally, the date for filing responses in the application proceeding is extended until December 28, 1990.

FEDERAL COMMUNICATIONS COMMISSION

James R. Keegan
Chief, Domestic Facilities Division
Common Carrier Bureau

Will McGibbon
Chief, Spectrum Engineering Division
Office of Engineering and Technology

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

COMMUNICATIONS SATELLITE CORPORATION — File No. CSS-89-002

Application for authority to participate in an INMARSAT program to extend the lease of the L-band capacity of the MARISAT system through 1992.

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: October 29, 1990; Released: November 7, 1990

By the Chief, International Facilities Division:

1. The above-captioned application, filed on April 10, 1989 by Communications Satellite Corporation (Comsat), requests authority pursuant to Section 504(c) of the International Maritime Satellite Telecommunications Act of 1978, 47 U.S.C. §753(c) (1978) and Title III of the Communications Act of 1934, as amended, 47 U.S.C. §§301-399B (1976), to participate in an INMARSAT program to extend the lease of the L-band capacity of Comsat's MARISAT system in order to provide back-up capabilities for the INMARSAT system, continue to provide maritime radiobroadcast service to Armed Forces Radio and Television Service (AFRTS), and potentially provide interim use of space segment capacity for domestic mobile services to be provided by recognized U.S. and Canadian Mobile Satellite Service (MSS) Carriers. The application was placed on public notice on April 19, 1989. Comments were filed by Geostar Messaging Corp. (GMC) and Qualcom, Inc. on May 19, 1989 and by American Mobile Satellite Corp. (AMSC) on May 22, 1989. A response to the GMC comments was filed by AMSC on June 2, 1989.

BACKGROUND

2. On July 10, 1986, the INMARSAT Council approved the lease of the L-band portion of the MARISAT spacecraft. The arrangement was for a 3-year period with options for renewal. The Commission's Memorandum Opinion, Order and Authorization released Oct. 23, 1986 (DA 86-83, File No. CSS-86-006) granted Comsat's application for authority to participate in the original 3-year lease. The Commission felt that back-up capacity would be necessary because of various problems with other INMARSAT satellites. Further, the Commission believed that Comsat had supported its claim that the lease would be cost-effective.

3. The INMARSAT Council has recently concluded arrangements to extend the lease for an additional 3-year period. The instant application seeks authority to participate in that extension. Comsat states that because INMARSAT satellites are no longer as healthy as they were, back-up capacity is required. INMARSAT is also now providing via this satellite audio service to AFRTS all over the world. Further, INMARSAT intends to provide certain capacity on the MARISAT F-1 Atlantic Ocean Region Satellite pursuant its domestic lease policy. Under this policy, Signatories may lease capacity to provide, *inter alia*, domestic MSS. Comsat World Systems Division intends to lease capacity from INMARSAT and in turn provide that capacity to Mobile Satellite Service carrier(s) for use in providing MSS in the United States.

COMMENTS

4. GMC states that it has no objection to grant of Comsat's application. It merely wishes to raise several issues which arise as a result of Comsat's intention to make available space segment capacity to MSS carriers. GMC states that such capacity must be made available to all domestic MSS providers on a non-discriminatory basis and at just and reasonable cost-based rates. Further, GMC asserts that INMARSAT should be allowed to offer space segment for MSS only until domestic satellite capacity is available. It believes that the Commission, in granting Comsat's application, should make clear that authorization to use INMARSAT space segment to provide domestic mobile satellite services will terminate as soon as a domestic satellite space segment in the maritime bands is available.

5. Qualcom, Inc. does not comment on the merits of the application. Its comments were filed to draw attention to the necessity of MSS carriers filing applications for lease of the L-band capacity.

6. AMSC states that it is the carrier authorized to provide MSS in the United States. It feels that the public interest would be served by a grant of the instant application although the exact parameters of the MARISAT service offering, including available capacity and service terms and conditions, have not been established. AMSC also filed a response to the GMC comments, in which it takes issue with GMC's characterization of itself as a "recognized MSS carrier" entitled to access directly the MARISAT system. AMSC states that whether GMC is a recognized MSS carrier is a separate issue and has no bearing on the utility of MARISAT as an interim option for MSS.

DISCUSSION

7. The Commission initially authorized Comsat to participate in the INMARSAT program to lease the L-band capacity of the MARISAT system based, in part, on the infirmities in various INMARSAT satellites. The Commission noted that the additional capacity made available under the lease appeared to be needed to ensure that quality maritime services would continue to be provided on a global basis. Based on Comsat's assertion that current INMARSAT satellites continue to have certain infirmities, it appears that the need to ensure back-up capacity for the INMARSAT system warrants extension of the lease. In addition, as Comsat notes, extension of the lease will allow continued provision of AFRTS all over the world as well as provision of capacity on an interim basis to MSS carrier(s). In light of these benefits, we find that a grant of the application will serve the public convenience and

necessity. We will address those issues concerning use of this space segment for MSS in other proceedings or applications specifically involving this area.

8. Accordingly, IT IS ORDERED that application File No. CSS-89-002 IS GRANTED, and Comsat is authorized to participate in an INMARSAT program to extend the lease of the L-band capacity of the MARISAT system as specified in the application.

9. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WORLD COMMUNICATIONS, INC. File No. I-T-C-90-126

Application for authority to acquire and operate digital cable facilities between Hawaii and Guam & between Guam and Japan.

ORDER AND AUTHORIZATION

Adopted: October 18, 1990; Released: November 7, 1990

By the Chief, International Facilities Division:

1. The above-captioned application, filed on June 1, 1990 by World Communications, Inc. (WorldCom), requests authority pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire on an indefeasible right of user (IRU) basis and operate additional capacity in the TPC-3 cable between Hawaii and Guam and between Guam and Japan. The application was placed on public notice on June 20, 1990. No comments were received. Upon consideration of the application, we find that grant of the application is required by the public convenience and necessity.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-90-126 IS GRANTED, and WorldCom is authorized to:

a. acquire from AT&T and Transpacific Communications, Inc. (Transpacific), on an IRU basis, 30 whole MAUOs in segments D1 and D3 of the TPC-3 cable system;

b. acquire from AT&T and Transpacific, on an IRU basis, a one-half interest in 30 MAUOs in southern segments D2 and D3 of the TPC-3 cable system;

c. acquire from KDD in Japan, on an IRU basis, a one-half interest in 30 MAUOs in northern segments D2 and D3 of the TPC-3 cable systems; and

d. use said facilities to provide WorldCom's regularly authorized services between the U.S. mainland, and Hawaii, on the one hand, and Guam, the Philippines and Australia, on the other hand and beyond.

3. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International
Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELESPHERE NETWORK, INC.,
Complainant,

v. File No. E-89-436

THE UNITED TELEPHONE
OPERATING COMPANIES,
Defendant.

ORDER

Adopted: November 2, 1990; Released: November 9, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On September 29, 1989, Telesphere Network, Inc. (hereinafter "Telesphere") filed the above-captioned formal complaint against The United Telephone Operating Companies (the "Defendant") seeking reimbursement and "other appropriate relief" for interstate access charges levied by the Defendant against Telesphere during the period from October 1, 1985 through December 31, 1986. In accordance with Commission rules governing formal complaint proceedings, Defendant's answer to the complaint was due on November 27, 1989. An answer and motion to dismiss were duly filed. On September 4, 1990, however, Telesphere filed a motion for leave to withdraw its complaint, stating that it does not wish to pursue its claim against the Defendant and is seeking leave to withdraw its complaint with prejudice.

2. On the basis of the statements contained in the Motion, we conclude that the public interest would be served by granting Telesphere's motion.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated in Section 0.291 of the Commission's Rules, 47 C.F.R. §0.291, that Telesphere's Motion for Leave to Withdraw Complaint IS GRANTED and that the above-captioned proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE &
TELEGRAPH COMPANY,
Complainant,

v. File No. E-90-82

CHILLICOTHE TELEPHONE COMPANY,
Defendant.

ORDER

Adopted: November 2, 1990; Released: November 9, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On November 22, 1989, American Telephone and Telegraph Company (hereinafter "AT&T") filed with the Commission the above-captioned formal complaint against the Chillicothe Telephone Company (hereinafter the "Defendant") seeking recovery of damages for Defendant's alleged overearnings on interstate access services for the period January 1, 1987 through December 31, 1988. In accordance with Commission rules governing formal complaint proceedings, the Defendant filed an answer to the complaint.

2. The parties to the above-captioned complaint have conducted discussions aimed at settling the complaint. As a result of these negotiations, the parties state that a mutually agreeable settlement of all pending controversies was reached. On October 29, 1990, the parties filed a joint motion seeking dismissal of the complaint with prejudice. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. §0.291, that the Joint Motion to Dismiss the above-captioned complaint IS GRANTED and that the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELESPHERE NETWORK, INC.,
Complainant,

v. File No. E-90-178

CONTEL OF CALIFORNIA, INC.,
Defendant.

ORDER

Adopted: November 2, 1990; Released: November 9, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. On November 22, 1989, American Telephone and Telegraph Company (hereinafter "AT&T") filed with the Commission the above-captioned formal complaint against Contel of California, Inc. (hereinafter the "Defendant") seeking recovery of damages for Defendant's alleged overearnings on interstate access services for the period January 1, 1987 through December 31, 1988. In accordance with Commission rules governing formal complaint proceedings, the Defendant filed an answer to the complaint.

2. The parties to the above-captioned complaint have conducted discussions aimed at settling the complaint. As a result of these negotiations, the parties state that a mutually agreeable settlement of all pending controversies was reached. On October 31, 1990, the parties filed a joint motion seeking dismissal of the complaint with prejudice. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

3. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. §0.291, that the Joint Motion to Dismiss the above-captioned complaint IS GRANTED and that the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE
Released: October 31, 1990

OPERATOR SERVICE PROVIDERS OF AMERICA PETITION FOR EXPEDITED DECLARATORY RULING

The Operator Service Providers of America (OSPA) has filed a petition requesting an expedited declaratory ruling that a recently enacted statute of the State of Tennessee is null and void and unenforceable insofar as it applies to interstate and foreign communications. The statute in question - Public Chapter 675 of the Tennessee Code Annotated - requires in part that any carrier offering operator-assisted services in Tennessee whose interstate rates exceed the maximum rates approved by this agency for a dominant carrier for an identical call take the following actions before providing such interstate service: (1) identify itself to the customer as the carrier providing the service; (2) state all costs for providing the service; and (3) offer to switch the customer to any other carrier offering operator-assisted services. The statute applies to calls originating in Tennessee that are billed to an address located within the state.

OSPA argues that, under the Communications Act of 1934 (the Act), this agency has exclusive jurisdiction to regulate interstate communications, and that, consequently, the Tennessee statute is null and void insofar as it applies to interstate communications. OSPA further argues that the Tennessee statute impairs important federal communications policies. According to OSPA, the Tennessee statute mandates interstate "call splashing" in violation of *Telecommunications Research and Action Center v. Central Corp*, 4 FCC Rcd 2157 (1989). OSPA also argues that the statute compels Operator Service Providers to charge unjust and unreasonable rates in violation of Section 201(b) of the Act, 47 U.S.C. § 201(b). OSPA states that the Tennessee Public Service Commission is presently engaged in enforcement actions causing immediate harm to interstate operator services providers in Tennessee, and requests that its ruling be granted on an expedited basis.

Interested parties may file comments on or before *November 28, 1990* and reply comments on or before *December 14, 1990* with the Secretary, Federal Communications Commission, 1919 M. Street, N.W. 20554. A copy should be sent to Peggy Reitzel, Common Carrier Bureau, Federal Communications Commission, 1919 M. Street, N.W., Washington, D.C. 20554 and to the International Transcription Service, Inc. (ITS), the Commission's contractor for public records duplication, 2100 M. Street, N.W., Suite 140, Washington, D.C. 20037. The OSPA petition is, and comments and reply comment will be when filed, available for inspection and photo duplication in Room 544, 1919 M. Street, N.W., Washington, D.C. 20554. Copies may additionally be obtained from ITS.

For further information contact Patrick Donovan, Common Carrier Bureau, (202) 632-4047.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

SPACE MARK COMMUNICATIONS, INC. — File Nos. 23334-CD-ML-01-88, 163500-90-12-BFW

For license to operate in the Public Mobile Service on Frequency 931.7625 MHz for Station KNKE220 at Union, New Jersey

MEMORANDUM OPINION AND ORDER ON RECONSIDERATION AND NOTICE OF APPARENT LIABILITY

Adopted: October 30, 1990; Released: November 8, 1990

By the Chief, Common Carrier Bureau:

1. Space Mark Communications, Inc. ("Space Mark") filed a Petition for Reconsideration of the action taken by the Mobile Services Division ("MSD") terminating Space Mark's Public Mobile Service ("PMS") license to operate station KNKE220 at Union, New Jersey. *See* Public Notice, Mimeo No. 384 (released Nov. 1, 1989) ("*Public Notice* ").

I. BACKGROUND

2. The deadline for filing FCC Form 405 for renewal of the license for station KNKE220 was April 1, 1989. Space Mark did not file its renewal application prior to the April 1, 1989 expiration deadline. On November 1, 1989, the MSD notified Space Mark that the authorization for station KNKE220 was terminated. *See Public Notice*, *supra* at 12. On November 16, 1989, seven months after the deadline for filing the renewal application and sixteen days after the staff action terminating the license, Space Mark filed an application for renewal for station KNKE220 (File No. 20957-CD-R-90). On November 29, 1989, Space Mark filed a Petition for Reconsideration of the MSD's action terminating the authorization.

II. SPACE MARK'S CONTENTIONS

3. Space Mark requests that the MSD action terminating its license be reconsidered and set aside. Space Mark states that it simply overlooked filing a renewal application. As a reason for the oversight, Space Mark contends that on March 1, 1988, it had filed an application for assignment of this license to Carrier Communications Corp. ("Carrier"), that there was confusion surrounding the status of its assignment application, and Space Mark simply overlooked filing its renewal application. In addition, Space Mark contends that, at most, the penalty for failure to file a renewal application is the imposition of a forfeiture, usually $10.00 per calendar day. Therefore, Space Mark requests that the application for late renewal be accepted for filing, placed on public notice, and granted. Furthermore, Space Mark states that "in light of the highly unusual circumstances of this case" (its assignment application not having been acted upon by the MSD), it should not be subjected to a forfeiture and that all sanctions should be waived.

III. DISCUSSION

4. Section 22.11(b), 47 C.F.R. § 22.11(b), in pertinent part provides: "Renewal of Station License. . . . FCC Form 405 (Application for Renewal of Station License) must be filed . . . between thirty (30) and sixty (60) days prior to the expiration date of the license sought to be renewed." In addition, Section 22.44(a)(1) of the Commission's rules states: "All authorizations shall terminate on the date specified on the authorization or on the date specified by these rules, unless a timely application for renewal has been filed." 47 C.F.R. §22.44(a)(1).

5. In addition, Section 22.44(a)(2) of the rules provides: "If no application for renewal has been made before the authorization's expiration date, a late application for renewal will only be considered if it is filed within 30 days of the expiration date and shows that the failure to file a timely application was due to causes beyond the applicant's control. . . . Service to subscribers need not be suspended . . . but such service shall be without prejudice to Commission action on the renewal application and any related sanctions." 47 C.F.R. §22.44(a)(2). Moreover, Section 22.45 establishes that Public Land Mobile nonwireline radio common carrier ("RCC") licenses expire on April 1 in the year of expiration. The year 1989 was established as the year of expiration for all non-wireline RCC licenses in *Common Carrier and Satellite Licensing Procedures Pursuant to the Communications Amendments Act of 1982*, 48 Fed. Reg. 27251 (June 14, 1983), notwithstanding when the initial authorization was issued.[1]

6. It is uncontroverted that Space Mark failed to timely file a renewal application. However, we agree with Space Mark that reconsideration of the MSD's action terminating its license is warranted in this case. In reaching this conclusion, we are guided by our desire not to disrupt service which is being provided to the public and by previous decisions where monetary forfeitures have been imposed for failure to timely file a renewal application notwithstanding the language of the rule requiring termination of expired, unrenewed authorizations. For instance, in *Tri-County Telephone Company, Inc.*, 54 Rad. Reg. 2d (P&F) 1065 (Com. Car. Bur. 1983), a forfeiture was imposed for failure to file a renewal application in violation of Section 22.11 of the rules and for operating the station without authorization. Therefore, we are setting aside the MSD's decision terminating Space Mark's authorization. In view of the cited decision, we likewise are issuing this Notice of Apparent Liability for Forfeiture and accepting for filing Space Mark's renewal application.

7. In view of the foregoing, we find that Space Mark has willfully and repeatedly violated Section 22.11 of the rules.[2] In fashioning appropriate penalties, we are required to consider "the nature, circumstances, extent, and gravity of the prohibited act committed, and with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require." 47 U.S.C. § 503(b)(2). The sanctions available to the Commission range from a written warning, to a forfeiture not to exceed $1,000,000.00, to a revocation of license. In the circumstances of this case,

where Space Mark failed to file a renewal application for seven months after it was due, we conclude that a $5,000.00 forfeiture is appropriate and that no more severe sanction is warranted. *See generally T - Com, Inc.*, 3 FCC Rcd 1772 (Com. Car. Bur. 1988), *application for review* filed (May 2, 1988); *Delray Cellular Associates*, 4 FCC Rcd 2233 (Mob. Serv. Div. 1989).

IV. ORDERING PARAGRAPHS

8. Accordingly, IT IS ORDERED that the Petition for Reconsideration filed by Space Mark Communications, Inc. IS GRANTED TO THE EXTENT INDICATED HEREIN.

9. IT IS FURTHER ORDERED that the action terminating license for Station KNKE220 IS SET ASIDE.

10. IT IS FURTHER ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. Section 503, and Section 1.80 of the Commission's Rules and Regulations, 47 C.F.R. Section 1.80, that Space Mark Communications, Inc. is apparently liable for forfeiture in the amount of $5,000.00 for violation of Section 22.11(b) of the Rules, 47 C.F.R. Section 22.11(b).

11. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Communication's rules, 47 C.F.R. Section 1.80(f)(3), that Space Mark Communications, Inc. may within thirty days of the date of this Notice pay the full amount of forfeiture in the manner provided for in Section 1.80(h) of the Commission's rules, or may file a response showing why a forfeiture should not be imposed or should be reduced.

12. IT IS FURTHER ORDERED that a copy of this Notice of Apparent Liability for forfeiture shall be sent by certified mail, return receipt requested, to Space Mark Communications, Inc., 28 South Third Street, Suite 100, Harrisburg, Pennsylvania 17101-2103.

13. IT IS FURTHER ORDERED that the renewal application filed by Space Mark Communications, Inc., File No. 20957-CD-R-90, IS ACCEPTED FOR FILING.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] Public Notice, Mimeo No. 2661 (released April 21, 1988), stated in pertinent part that "Non-wireline common carriers are required to file renewal applications for Public Mobile Service authorizations no earlier than 60 days but not less than 30 days before April 1, 1989."

[2] The term willful is defined in the Communications Act as "...the conscious and deliberate commission or omission of such act, irrespective of any intent to violate . . . any rule or regulation of the Commission . . . ". *See* 47 U.S.C. §312(f)(1). Under the circumstances of this case, Space Mark's assignment application was not granted and Space Mark is not entitled to rely on a third party to meet its responsibility to file a timely renewal application. Therefore, we find that Space Mark has willfully violated Section 22.44(a)(2) of the rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-46

In the Matter of

Amendment of Section 73.202(b), RM-7145
Table of Allotments,
FM Broadcast Stations.
(Ketchum, Oklahoma)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 24, 1990; Released: November 13, 1990

By the Assistant Chief, Policy and Rules Division:

1. At the request of LeeMay Broadcasting Company, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 1002 (1990), proposing the substitution of Channel 298C1 for Channel 298C2 at Ketchum, Oklahoma, and the modification of its license for Station KGND to specify operation on the higher powered channel. Petitioner filed comments reiterating its intention to apply for Channel 298C1, if allotted. The petitioner has also restated its intention to file an application to relocate the transmitter of its co-owned Station KWFM, Channel 281A, Fredonia, Kansas, to avoid prohibited overlap of the 3.16 mV/m contours of the two stations. No other comments were received.

2. We believe the public interest would be served by substituting Channel 298C1 for Channel 298C2 at Ketchum, Oklahoma, since it could enable Station KGND to expand its coverage area. Channel 298C1 can be allotted to Ketchum in compliance with the Commission's minimum distance separation requirements with a site restriction of 47.5 kilometers (29.5 miles) northwest of the community to avoid a short-spacing to Stations KAYI, Channel 295C, Muskogee, Oklahoma, KMOQ, Channel 296A, Baxter Springs, Kansas, and KLMK, Channel 297C, Poteau, Oklahoma, as well as to accommodate petitioner's desired transmitter site.[1] In addition, the petitioner is expected to submit an application specifying a new transmitter site for Station KWFM, Fredonia, Kansas, that will avoid overlap of the 3.16 mV/m contours of the two commonly owned stations which is prohibited by the Commission's radio "duopoly" rule.[2] Finally, as proposed, we will modify petitioner's license for Station KGND to specify operation on Channel 298C1 in lieu of its present Channel 298C2.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 28, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Ketchum, Oklahoma	298C1

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of LeeMay Broadcasting Company, Inc., for Station KGND, Ketchum, Oklahoma, IS MODIFIED to specify operation on Channel 298C1, in lieu of Channel 298C2, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The coordinates for Channel 298C1 at Ketchum are North Latitude 36-46-33 and West Longitude 95-27-15.

[2] *See* 47 C.F.R. §73.3555(a)(2).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
October 31, 1990

Released: November 2, 1990

Jerald N. Fritz, Esq. C8-186
Vice President for Legal Affairs
Allbritton Communications
800 Seventeenth Street, N.W.
Suite 301
Washington, D.C. 20006

Pulitzer Broadcasting Company
c/o Erwin G. Krasnow, Esq.
Verner, Liipfert, Bernhard, McPherson & Hand
901 15th Street, N.W.
Washington, D.C. 20005

Dear Mr. Fritz and Mr. Krasnow:

This is in response to your request for clarification of a letter ruling dated June 25 1990 (DA 90-871, released July 3, 1990), concerning the obligation of broadcast stations to accommodate candidates for public office who desire to purchase political advertising time during the weekend before an election.

As we stated in our June 28, 1990 letter, whether a broadcaster has met its equal opportunities or reasonable access obligations in any particular case will depend on the specific facts involved. We further stated that while we have found no precedent or legislative history that suggests that stations are required to make extraordinary efforts to remain open outside of normal business hours for the purpose of selling political advertising time, denying access to political candidates, when the station's business office is formally closed but "the station is otherwise staffed for purposes of arranging and providing programming," may be unreasonable and inconsistent with a broadcaster's obligations under Section 312(a) and Section 315(a) of the Communications Act.

You state that it is unclear from our ruling when a broadcaster is obligated to sell political advertising time during a weekend when the station is officially closed. Broadcasters must take into consideration the needs of federal candidates in connection with their requests for time. *Carter / Mondale Presidential Committee, Inc.*, 74 FCC 2d 631 (1979), *recon. denied*, 74 FCC 2d 657 (1979), *aff'd sub. nom. CBS Inc. v. FCC*, 629 F. 2d 1 (D.C. Cir. 1980), *aff'd*, 453 U.S. 367 (1981). Subject to this, you are correct that it is the responsibility of the broadcaster to determine the placement and amount of time that must be made available to candidates in order to comply with the requirements of the Communications Act. We did not intend to create any additional burdens upon licensees to provide special access to political candidates over the weekend.

In evaluating whether a particular broadcaster has complied with its responsibility to provide "reasonable access," however, the Commission will take note of that broadcaster's practices with respect to weekend or other "after-hours" access for its most favored commercial advertisers. Thus, to the extent that a broadcaster would make "extraordinary efforts" to accommodate its most favored commercial advertiser, we would expect comparable treatment for political candidate access.

We hope that the above clarifies our earlier ruling.

Staff action here is taken pursuant to delegated authority. Application for Review by the full Commission may be requested within thirty days of the date of this letter by writing the Secretary, Federal Communications Commission, Washington, D.C. 20554, stating the factors warranting consideration and, if mailed, should be sent by certified mail.

Sincerely,

Milton O. Gross, Chief
Fairness/Political Programming Branch
Enforcement Division
Mass Media Bureau

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-140

In the Matter of

Amendment of Section 73.202(b),	RM-7197
Table of Allotments,	
FM Broadcast Stations.	
(Pierre, South Dakota)	

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 24, 1990; Released: November 13, 1990

By the Assistant Chief, Policy and Rules Division:

1. At the request of Robert E. Ingstad (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 1765 (1990), proposing the substitution of Channel 224C1 for Channel 224A at Pierre, South Dakota, and the modification of his license for Station KGFX-FM to specify operation on the higher powered channel. Petitioner filed comments reiterating his intention to apply for Channel 224C1, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 224C1 for Channel 224A at Pierre, South Dakota, since it could provide the community with an additional wide coverage area FM service. Channel 224C1 can be allotted to Pierre in compliance with the Commission's minimum distance separation requirements and can be used at the station's licensed transmitter site.[1] As proposed, we will also modify petitioner's license for Station KGFX-FM to specify operation on the higher powered channel in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 28, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Pierre, South Dakota	224C1, 237C2

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Robert E. Ingstad, for Station KGFX-FM, Pierre, South Dakota, IS MODIFIED to specify operation on Channel 224C1, in lieu of Channel 224A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 224C1 at Pierre are North Latitude 44-22-15 and West Longitude 100-24-17. In the *Notice*, the Commission stated that the allotment of Channel 224C1 would require the relocation of Station KGFX-FM's transmitter in order to avoid a short-spacing to the proposed allotment of Channel 224C3 at Ainsworth, Nebraska. That request, however, was dismissed on January 30, 1990. *See* 5 FCC Rcd 1765 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-535

In the Matter of

Amendment of Section 73.202(b), RM-7520
Table of Allotments,
FM Broadcast Stations.
(Bowling Green, Kentucky)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 24, 1990; Released: November 13, 1990

By the Assistant Chief, Policy and Rules Division:

1. Daily News Broadcasting Company (petitioner), licensee of Station WDNS(FM), Channel 252A, Bowling Green, Kentucky, has filed a petition for rule making requesting the substitution of Channel 252C3 for Channel 252A at Bowling Green, Kentucky, and modification of its license for Station WDNS(FM) to specify Channel 252C3. Petitioner states its intention to apply for the channel, if allotted.

2. We believe it would be in the public interest to seek comments on petitioner's proposal since it could provide Bowling Green with a wide area FM service. An engineering analysis inidcates that Channel 252C3 can be allotted to Bowling Green in compliance with the Commission's minimum distance separation requirements.[1]

3. As requested, we shall also propose to modify the license of Station WDNS(FM) to specify operation on Channel 252C3. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in use of the higher powered channel at Bowling Green or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such interested parties.

4. In view of the above, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Bowling Green, Kentucky	244A, 252A	244A, 252C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 4, 1991,** and reply comments on or before **January 22, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Peter Guttman
Pepper & Corazzini
200 Montgomery Building
1776 K Street, N.W.
Washington, D.C. 20006
(Attorney for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 252C3 at Bowling Green are North Latitude 36-59-18 and West Longitude 86-27-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-536

In the Matter of

Amendment of Section 73.202(b), RM-7528
Table of Allotments,
FM Broadcast Stations.
(Claxton, Georgia)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 24, 1990; Released: November 13, 1990

By the Assistant Chief, Policy and Rules Division:

1. Evans Broadcasting Company, Inc. (petitioner), licensee of Station WCLA(FM), Channel 296A, Claxton, Georgia, has filed a petition for rule making requesting the substitution of Channel 297C3 for Channel 296A at Claxton, Georgia, and modification of its license for Station WCLA(FM) to specify the higher class channel. Petitioner states its intention to apply for the channel, if allotted.

2. We believe petitioner's proposal warrants consideration because it could provide a wide coverage area FM service to Claxton. An engineering analysis has determined that Channel 297C3 can be substituted for Channel 296A at Claxton in compliance with the Commission's minimum distance separation requirements with a site restriction of 1.4 kilometers (0.8 miles) northwest,[1] in order to avoid a short-spacing to Station WCRJ(FM), Channel 297C1, Jacksonville, Florida, and Station WKQB(FM), Channel 298C, St. George, South Carolina.

3. As requested, we shall also propose to modify the license of Station WCLA(FM) to specify operation on Channel 297C3. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in use of the higher powered channel at Claxton or require the proponent to demonstrate the availability of an additional equivalent class channel for use by such interested parties.

4. In view of the above, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Claxton, Georgia	296A	297C3

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 4, 1991,** and reply comments on or before **January 22, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Edward W. Hummers, Jr.
Estella Salvatierra
Fletcher, Heald & Hildreth
1225 Connecticut Avenue, N.W.
Suite 400
Washington, D.C 20036
(Attorneys for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 297C3 at Claxton are North Latitude 32-10-20 and West Longitude 81-55-09.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-509

In the Matter of

Amendment of Section 73.202(b), RM-6816
Table of Allotments,
FM Broadcast Stations.
(Denison-Sherman, Texas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 24, 1990; Released: November 13, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 8147 (1989), issued in response to a petition filed by Transcontinental Broadcasting Company, Inc. (petitioner), proposing the substitution of FM Channel 269C3 for Channel 269A at Denison-Sherman, Texas. Petitioner also requested modification of its license for Station KDSQ(FM), Channel 269A, to specify operation on the new channel. Petitioner filed supporting comments in which it reaffirmed its interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 269C3 for Channel 269A at Denison-Sherman, Texas, since it would provide an expanded FM service to the area. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at the site specified by the petitioner.[1] In addition, we are modifying the petitioner's license for Station KDSQ(FM), Denison-Sherman, Texas, to specify operation on Channel 269C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 28, 1990**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Denison-Sherman, Texas	269C3

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the license of Station KDSQ(FM), Denison-Sherman, Texas, IS MODIFIED to specify operation on Channel 269C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Andrew J. Rhodes, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 269C3 are 33-41-24 and 96-40-28, which is located 13.6 kilometers (8.4 miles) southwest of Denison and 8.5 kilometers (5.3 miles) northwest of Sherman. Because the petition which resulted in this allotment was filed prior to October 2, 1989, the licensee may avail itself of the provisions of Section 73.213(c)(1) of the Commission's Rules. *See* 47 CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-218

In the Matter of

Amendment of Section 73.202(b), RM-C086
Table of Allotments.
FM Broadcast Stations.
(Black River Falls, Wisconsin)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 24, 1990; Released: November 13, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 5357 (1989), proposing, *inter alia*,[1] the reclassification of Station WWIS-FM, Channel 259A, Black River Falls, Wisconsin, to Channel 259C3, and modification of the construction permit issued to WWIS Radio, Inc. ("WWIS Radio") to specify the higher powered channel. WWIS Radio filed comments and a supplement to its comments stating its interest in the substitution of Channel 259C3 for Channel 259A at Black River Falls.[2]

2. We believe the public interest would be served by the substitution of Channel 259C3 for Channel 259A at Black River Falls, Wisconsin, since it would provide the community with its first wide area coverage FM service. The channel can be allotted to Black River Falls in compliance with the minimum distance separation requirements of the Commission's Rules at the site suggested by WWIS Radio, Inc. [3] We have authorized a modification of the construction permit for Channel 259A, Black River Falls, Wisconsin, to specify operation on Channel 259C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, that effective **December 28, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Black River Falls, Wisconsin	259C3

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the permit for Channel 259A, Black River Falls, Wisconsin, IS MODIFIED to specify operation on Channel 259C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] The *Notice*, issued in MM Docket No. 89-133, *et al.* proposed to amend the FM Table of Allotments for 149 Class A FM stations at various locations throughout the United States and territorial possessions by reclassifying their operation from a Class A to a Class C3, and proposed modification of their station authorizations accordingly.

[2] The FAA filed comments concerning this docket and other dockets initiated simultaneously. *See* 5 FCC Rcd 2152, fn.4 (1990). The FAA's concerns will be treated consistent with the treatment afforded in other, similar proceedings.

[3] The coordinates for Channel 259C3 are 44-19-11 and 90-53-31. Since the proposal that resulted in this allotment was initiated prior to October 2, 1989, WWIS Radio, Inc. may avail itself of the provisions of Section 73.213(c) of the Commission's Rules. *See* 47 CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 85-234

In re Applications of

CHARISMA BROADCASTING CORPORATION	File No. BPCT-850207KG
ARLINGTON 68 TV, INC.	File No. BPCT-850418KZ
UNITED BROADCAST GROUP, LTD.	File No. BPCT-850419KE
SOUTHWEST COMMUNICATIONS, LTD.	File No. BPCT-850419KO
JOHNSON TELEVISION, LTD.	File No. BPCT-850422KG
BRISCOE BROADCASTING, LTD.	File No. BPCT-850422KH
METROPLEX COMMUNICATIONS, INC.	File No. BPCT-850422KP
SAMMY A. THORNTON	File No. BPCT-850422KR
NATIVE AMERICAN BROADCASTING COMPANY, A LIMITED PARTNERSHIP	File No. BPCT-850422KU

For Construction Permit for a New Television Station in Arlington, Texas

Appearances

Morton L. Berfield and *John J. Schauble* on behalf of Charisma Broadcasting Corporation, *Chester F. Naumowicz* on behalf of Arlington 68 TV, Inc., *Bradford D. Carey* on behalf of United Broadcast Group, Ltd., *Cheryl A. Kenney* on behalf of Southwest Communications, Ltd., *Stephen C. Simpson* and *Jeffrey D. Southmayd* on behalf of Johnson Television, Ltd., *Stephen Diaz Gavin* on behalf of Channel 68, North Texas Television Limited Partnership, *L. Kendall Satterfield* on behalf of Metroplex Communications, Inc., *James L. Oyster* on behalf of Sammy A. Thornton, *Melodie A. Virtue* on behalf of Native American Broadcasting Company Limited Partnership, and *Jerry M. Hermele* on behalf of Mass Media Bureau.

SUPPLEMENTAL INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH P. GONZALEZ

Issued: November 2, 1990; Released: November 13, 1990

1. By a *Initial Decision* released on May 15, 1989 (FCC 89D-16) the undersigned found that Channel 68, North Texas Television Limited Partnership's (North Texas) proposal was superior to that of any other applicant and he concluded that a grant of North Texas' application would best serve the public interest.

2. The Review Board in a *Memorandum Opinion and Order* (FCC 90R-31) on May 10, 1990 remanded this proceeding to the undersigned for the adduction of additional evidence and for the preparation of a supplemental initial decision on the following issue:

> To determine whether Channel 68, North Texas Television Limited Partnership is financially qualified to be a Commission licensee.

It further ordered that the burdens of proceeding and proof on the issue would be on Channel 68, North Texas Limited Partnership.

3. At a further prehearing conference held on July 24, 1990 procedural dates were set to govern the prosecution of the additional issue designated against North Texas by the Review Board. (*See Order*, released on July 27, 1990). Shortly before the further hearing was scheduled to begin on September 25, 1990, North Texas filed a formal request that its application be dismissed with prejudice. The request was granted by *Order* released on September 24, 1990. The issue designated by the Review Board has, therefore, been rendered moot since North Texas is no longer a party to this proceeding.

4. The decision as to which proposal for the Arlington, Texas facility would best serve the public interest now rests upon a consideration of the proposals of Charisma Broadcasting Corporation (Charisma) and Sammy A. Thornton (Thornton) which alone among the remaining applications have been found to be entitled to a 100 percent quantitative integration credit and both are not subject to a diversification demerit of any degree. Upon further review of the evidence of record with respect to these two applications, the Presiding Judge concludes that the fact that two of Charisma's integrated principals are females and one of these women is Black entitles Charisma to a moderate comparative advantage over Thornton whose sole integrated principal is a non-minority male. The two applications are in all other respects equal under the comparative criteria. Accordingly, the Presiding Judge concludes that Charisma's proposal is superior to that of Thornton's, and Charisma is entitled to a grant of the permit for the Arlington, Texas facility.

Rulings

5. Accordingly, IT IS ORDERED that unless an appeal from this *Supplemental Initial Decision* is taken by a Party or the Commission reviews this Supplemental Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Commission's Rules, 47 C.F.R. 1.276, the application of Charisma Broadcasting Corporation (File No. BPCT-850207KG) for authority to construct a new commercial television station to operate

on channel 68, Arlington, Texas IS GRANTED; that the applications of Arlington 68 TV, Inc. (File No. BPCT-850418KZ), United Broadcast Group, Ltd. (File No. BPCT-850419KE), Southwest Communications, Ltd. (File No. BPCT-850419KO), Johnson Television, Ltd. (File No. BPCT-850422KG), Briscoe Broadcasting, Ltd. (File No. BPCT-850422KH), Metroplex Communications, Inc. (File No. BPCT-850422KP), Sammy A. Thornton (File No. BPCT-850422KR), and Native American Broadcasting Company, A Limited Partnership (File No. BPCT-850422KU) ARE DENIED.

And IT IS FURTHER ORDERED that to the extent that the *Initial Decision* of the undersigned released on May 15, 1989 is inconsistent with the conclusions reached and rulings entered above, IT IS VACATED and SET ASIDE.

FEDERAL COMMUNICATIONS COMMISSION

Joseph P. Gonzalez
Administrative Law Judge

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-338

In re Applications of

KENNELWOOD BROADCASTING COMPANY, INC.	File No. BPH-870629MU
EXCELSIOR COMMUNICATIONS, INC.	File No. BPH-870630NA
CHASE COMMUNICATIONS, INC.	File No. BPH-870630NB

For a Construction Permit for
a New FM Station on Channel 233A
in Waco, Texas

Appearances

Timothy K. Brady, on behalf of Kennelwood Broadcasting Company, Inc.; *Maurita K. Coley, Susan Whelan Westfall, Yvonne Rena Benneu* and *David M. Silverman*, on behalf of Excelsior Communications, Inc.; *Robert Lewis Thompson*, and *Howard J. Barr*, on behalf of Chase Communications, Inc.; and *Norman Goldstein*, on behalf of the Chief, Mass Media Bureau.

INITIAL DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: November 2, 1990; Released: November 16, 1990

PRELIMINARY STATEMENT

1. This comparative proceeding involves the mutually exclusive applications of Chase Communications, Inc. (Chase), Excelsior Communications, Inc. (Excelsior) and Kennelwood Broadcasting Company, Inc. (KBC) for a new FM station on Channel 233A at Waco, Texas.

2. The three foregoing applications and two other applications[1] were designated for hearing on the following issues:

> 1. To determine, which of the proposals would, on a comparative basis, best serve the public interest.
>
> 2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted.

Hearing Designation Order, DA 89-885, released August 9, 1989, at ¶ 7.

3. A prehearing conference was held on October 11, 1989, and hearings were conducted at the Commission's headquarters in Washington, D.C. on February 13-15, 1990. The record was closed by *Order*, FCC 90M-457, released March 7, 1990. Proposed findings of fact and conclusions of law were filed on May 4, 1990 and replies were filed May 23, 1990.

FINDINGS OF FACT

KENNELWOOD BROADCASTING COMPANY, INC.

Background

4. Kennelwood Broadcasting Company, Inc. (Kennelwood) is a Texas corporation which is authorized to issue 1,000 shares of common voting stock (KBC Ex. 2 at 1). All shares are currently issued and outstanding (KBC Ex. 2 at 1). The shareholders of KBC are Jerry Lenamon and Loy Lenamon, husband and wife. Jerry Lenamon holds 500 shares of the issued and outstanding common voting stock; Loy Lenamon holds the remaining 500 shares (Tr. 167-168; KBC Ex. 2 at 1). Jerry Lenamon is President and a director of KBC (KBC Ex. 3 at 1). Loy Lenamon is Secretary, Treasurer and a director of KBC. There are no other shareholders, officers or directors of KBC (KBC Ex. 1 at 1).

5. Mr. and Mrs. Lenamon will be integrated into the management and operation of the proposed station on a full-time (minimum 40 hours per week) basis. Mr. Lenamon will serve as General Manager. His duties will include overall supervision of all phases of station operation and direct supervision of the station's programming and technical operation. Mrs. Lenamon will serve as Business Manager. Her duties will include supervision of all phases of the station's business and financial affairs including sales, traffic, billing, bookkeeping, purchasing, personnel matters and public relations. Together with her husband, Mrs. Lenamon will oversee the ascertainment of community needs and interests and formulate responsive programming to meet those needs and interests; formulate station policy; and implement the station's EEO Program (KBC Ex. 23).

6. Mr. and Mrs. Lenamon currently work full-time in the operation of Lone Star Safari, a travel/camping goods store which they jointly own. The store was started up in the fall of 1989 (KBC Ex. 2, 3; Tr. 58). In the event KBC's application is granted, Mr. and Mrs. Lenamon will terminate their employment and day to day involvement with this business (KBC Ex. 2, 3). The day-to-day responsibilities will be turned over to a full-time employee (KBC Ex. 2; Tr. 58, 73-74). In this regard, the store requires the Lenamon's full-time involvement because the business was just recently opened. However, once the store is established, which the Lenamons believe will take about a year, the store can be successfully maintained by a full-time employee plus part-time or seasonal sales help (Tr. 137, 144-145). Mr. and Mrs. Lenamon will devote no more than 3 hours per week, each, to overseeing its operation. Such oversight will consist of reviewing the store's books to see how the store was doing financially

and discussing such matters with the manager (KBC Ex. 2; Tr. 88, 138-139, 155). The Lenamons are also prepared to sell the business should its continued operation without their day-to-day involvement prove not to be feasible. However, based upon the current operations and revenues of this business, the sale of the business is believed to be unnecessary (KBC Ex. 2, Tr. 74, 190).

7. Ms. Lenamon currently devotes approximately 10 hours per week to managing Kennelwood Investments, a real estate business, which she owns with her husband. Kennelwood Investments owns commercial property consisting of a building and an unimproved parcel of land. In the event KBC's application is granted, she will continue to manage the family owned business but will reduce the amount of time she devotes to these activities to a total of 2 hours per week by contracting out the bookkeeping, which she currently does herself (KBC Ex. 3; Tr. 69, 96).

8. Mr. Lenamon was born in Waco, Texas in 1950 and has remained a Waco resident, except for a 6-month absence while he was in California in the Navy (KBC Ex. 2 at 2).

9. Mr. Lenamon has been involved in civic activities in Waco, Texas, and within the primary service area. From 1975 to the present, Mr. Lenamon has been a member of the Lone Star Mensa and regularly attends the bi-monthly meetings and participates in the activities of this organization, which is a local branch of the Austin Chapter. The main project of this organization is providing two academic scholarships annually for local college students. He devotes approximately two hours per month to this activity. From 1985 to the present, Mr. Lenamon has been a member of the Central Texas Zoological Society. As a member of this organization he has helped to sponsor and promote the Central Texas Zoo at Waco. In addition Mr. Lenamon and his wife have participated in the Zoological Society's "adopt an elephant" project, having adopted one of the zoo's elephants for a year in 1984. Mr. Lenamon has not served as an officer or committee member of the Zoo. From 1984 to the present, Mr. Lenamon has been a member of the Waco Bike Club. As a member of this organization Mr. Lenamon has been involved in the club's charitable activities. In this regard he has volunteered his time to assist with the club's annual "Triathlon" and "Wild West Century Bike Ride." The proceeds from each of these annual events are donated to various local charities. Mr. Lenamon has been involved in the preparations for and administration of these two annual events, serving as an event marshall in each of the years which he has been a member of this organization. Mr. Lenamon spends a total of four days participating in the Bike Club's annual events. Also, he attends monthly Bike Club meetings that last 1 1/2 - 2 hours. Mr. Lenamon has been a member of the Animal Aides Society from 1986 to the present and has participated in this organization's sponsorship of a spay and neuter clinic in the Waco community and its fundraising for the benefit of the local Humane Society. He is not an officer or committee member. From 1986 to the present, Mr. Lenamon has been a member of the Central Texas Audubon Society. He participates in the regular monthly educational programs presented by this organization, which address matters relating to ecology and wildlife and are open to the public. Mr. Lenamon has participated in other activities of this organization, including its ongoing recycling drive (KBC Ex. 2; Tr. 181-202).

10. Mrs. Lenamon was born in Waco, Texas in 1949 and has remained a Waco resident, except for a 4 month absence in 1972 (KBC Ex. 3 at 3).

11. Ms. Lenamon has been involved in civic activities in Waco, Texas, and within the primary service area of the station proposed by Kennelwood Broadcasting Company, Inc. In this regard, from 1983 through 1986 Ms. Lenamon was a member of the Waco Junior Women's Club, which is a local chapter of the Federation of Women's Clubs of America, a service organization. The local activities of this organization include providing volunteer assistance to various community and charitable organizations and for various projects, including: Meals on Wheels (preparing meals for distribution), the Rape Crisis Center (gathering and donating items and distributing pamphlets and information), Evangelia Center (gathering and donating items for children), Family Abuse Center (gathering and donating items needed by the center) and Experiment in International Living (recruiting hosts and organizing activities). During the years of her involvement with this organization, Ms. Lenamon regularly participated in each of these various activities. She estimates she devoted three hours per week to this activity. She did not serve as an officer of the Club. From 1983 to 1988, Ms. Lenamon was an active participant in an organization known as Experiment in International Living, which is an international organization that promotes global understanding on a local level by arranging visits to the local community by persons from foreign countries. Ms. Lenamon was the local (Waco) project coordinator for two long-term student exchanges in 1985 and 1988. In 1984 she was the project coordinator and had overall responsibility for planning, organizing and overseeing a 3 week visit to Waco by 14 Japanese students and their chaperones. She recruited host families for each of the students and conducted orientation activities for the host families before the students arrived. She was responsible for all group activities, publicity, general administration of the program and the welfare of the students. In addition, Ms. Lenamon and her husband participated as hosts for two different foreign students visiting Waco at two different times under this program in 1983.

12. From May, 1989 to the present, Ms. Lenamon has been a founding member and Treasurer of the Waco Writers Guild, an organization formed for the purpose of promoting the literary arts in the community. Membership in the organization is open to the public, which attempts to serve the needs of published as well as nonpublished writers, as well as those simply interested in writing. She devotes less than one hour per week to this activity; her term as treasurer will end this spring. Ms. Lenamon has been a member of the Central Texas Zoological Society from 1985 to the present. As a member of this organization she has helped to sponsor and promote the Central Texas Zoo at Waco. In addition Ms. Lenamon and her husband have participated in the Zoological Society's "adopt an elephant" project, having adopted one of the zoo's elephants for a year in 1984. She has not served as an officer or committee chairman of any Zoo activity. From 1986 to the present, Ms. Lenamon has been a member of the Animal Aides Society and has participated in this organization's sponsorship of a spay and neuter clinic in the Waco community and its fundraising for the benefit of the local Humane Society. She has not been an officer of the Society. From 1986 to the present, Ms. Lenamon has also been a member of the

Central Texas Audubon Society. She participates in the regular monthly educational programs presented by this organization, which address matters relating to ecology and wildlife and are open to the public. Ms. Lenamon has participated in other activities of this organization, including its ongoing recycling drive. She has not served as an officer of this group (KBC Ex. 3; Tr. 127-133, 146).

Diversification

13. Neither KBC nor either of its principals have any interests in a medium of mass communications (KBC Ex. 1).

Auxiliary Power

14. KBC will install and utilize auxiliary power generating equipment at its studio and transmitter sites (KBC Ex. 1).

EXCELSIOR COMMUNICATIONS, INC.

Background

15. Excelsior Communications, Inc. (Excelsior) is a corporation formed in 1986 under the laws of the State of Texas. Excelsior's directors, officers and shareholders have been continuously (since at least as early as March 30, 1987) the following:

Name	Office	Ownership/Voting Interest
Dr. Arthur T. King	President/Director	25%
Marilyn O. Marshall	Vice President/ Secretary/Director	25%
Alvan L. Pollard, Sr.	Vice President/ Director	25%
Eric H. Hooker	Vice President/ Director	25%

The initial Articles of Incorporation filed on January 7, 1986 list Mr. Norman Adamson, Sr. as one of the members of the initial Board of Directors. However, Mr. Adamson formally resigned all his interest in the corporation by letter dated March 30, 1987. Since that time, the corporation has continued to operate with the four above-named principals, each having equal rights and responsibilities (Excelsior Ex. 1).

16. Excelsior is authorized to issue two classes of stock, Class A and Class B, and neither class has been designated "voting" or "nonvoting." Each of the four principals has paid an equal sum of money for his/her stock ownership, although no certificates of stock had been issued as of January 29, 1990. All four principals have contributed equally to all expenses incurred, they have equal responsibilities, and will continue to have an equal vote in all matters requiring a vote (Excelsior Ex. 1).

Integration

17. Arthur King proposes to serve full-time (40 or more hours per week) as Station Manager and Program Director (Excelsior Ex. 3 at 1). He proposes to directly supervise *all* on-air personnel, programming and technical operations. *Id.* When asked how he would supervise on-air people in the mornings when he is not there, King said he would have a "senior programming person" do it (Tr. 225-226).

18. King currently is employed at Baylor University as a full-time, tenured professor (*Id.*; Tr. 336). If Excelsior's application is granted, he will continue to be a full-time, tenured professor at Baylor (Tr. 226). In a prototype schedule that King developed, based on his spring 1990 Baylor schedule (Tr. 221), he estimated that he would work at the radio station: 4 p.m. to 7 p.m. on Mondays, all day Tuesdays and Thursdays, 8 a.m. to 10 a.m. and 5 p.m. to 8 p.m. on Wednesdays and Fridays, 10 a.m. to 3 p.m. on Saturdays and 3 p.m. to 6 p.m. on Sundays (Tr. 223-224). Because his Baylor schedule is subject to change, his hours would not be uniform (Tr. 226). He spends nine hours per week preparing for his nine hours of in-class instruction (Tr. 236). He spends at least six hours per week as an advisor on minority affairs to Baylor's president (Tr. 238). He serves on two university committees, whose meetings he must attend (Tr. 240-241). In addition, he spends time doing research (Tr. 241-242), about 50 hours per year (Tr. 281). It also is incumbent on him to attend out-of-town professional conferences (Tr. 228-229). King stated that he probably works at Baylor more hours than the average person who puts in a 40-hour week (Tr. 336-337). Although Excelsior's Integration Statement pledged that King would withdraw partially from his employment at Baylor to the extent necessary to accommodate his commitment to the station" (Tr. 342), King testified at hearing that he will not withdraw from those things generally required of a tenured professor at Baylor (Tr. 339). He does not anticipate "cutting back" on activities at Baylor (Tr. 231). He intends to renew his contract with Baylor (Tr. 235). He has not, however, discussed Excelsior's FM application with his Dean, who signs his annual contract (Tr. 353-354).

19. Dr. King is black. He currently resides within the 3.16 mV/m contour and has done so for the past seven years (Excelsior Ex. 3). He has never resided within the city limits of Waco (Tr. 211).

20. Dr. King has the following civic affiliations. He was elected to the National Board of Directors, Goodwill Industries of America, Inc., in 1988. He was President, Board of Directors, Heart of Texas Goodwill, Inc., from 1987 to 1989 and a member of the Board from 1985 to the present. He has been President, Board of Directors, Economic Opportunities Advancement Corporation for Planning Region XI, from 1988 to the present. He has served on the Board of Directors of that organization from 1985 to the present. He has been a member of the Downtown Waco Kiwanis Club from 1984 to the present and he was Chairman of the Citizenship Achievement Committee from 1987 to 1988, and a member of the Board of Directors from 1988 to 1989 (Excelsior Ex. 3).

21. *Alvin Pollard, Sr.*, proposes to serve part-time (30 hours) as the FM station's Sales Manager (Excelsior Ex. 6 at 1). He proposes to supervise the sales staff and to develop and review sales policies. *Id.* He would do some sales work himself (Tr. 447). He does not envision any full-time sales employees (Tr. 456). At first, he envisions one or two sales people working as little as 12 hours per week (Tr. 456; 463). The sales people would initially spend nine hours per week in "training" (Tr. 458), which he might have to contract out (Tr. 459).

22. Pollard currently is employed as "full-time" Dean of Technical Education at McLennan Community College, requiring eight hours per day, 40 hours per week of his time (Excelsior Ex. 6 at 1; Tr. 439-440). He sometimes even works on weekends (Tr. 441). If Excelsior's applica-

tion is granted, he will not give up his position as full-time Dean nor will he take a cut in pay (Tr. 444). He would work at the FM station from 7 to 10 p.m. Monday through Friday, eight hours on Saturday and seven hours on Sunday (Tr. 445). He would not be able to supervise the sales force during its "regular" business days (Tr. 448-450). On Sundays, he would do anything, even it if means "cleaning the building." (Tr. 455).

23. Pollard is black. Since 1976, he has lived at 1156 Western Oaks Drive, Waco, Texas 76712, which is outside the city limits of Waco in a community called Woodway, but within the predicted 3.16 mV/m contour of the station. Prior to that time (since 1973), he lived on Cliffdale Street, which is within the Waco city limits (Excelsior Ex. 6).

24. Pollard has held or holds the following civic positions: Member of Rotary International (1977-Present); Board of Directors of Waco Boys Club (1978-1979); Member of Knights of Columbus (1981-Present); Board of American Heart Association (1980-1983); Chairman Vocational Educational Advisory Committee, Connally Independent School District (1983-1985); Board of Directors of Waco Family Home Care Agency, Inc. (1985-1987); Providence Hospital Advisory Board (1987-1988); and Co-chairman, Heart of Texas Regional Planning Committee (1988-Present) (Excelsior Ex. 6).

25. *Eric H. Hooker* proposes to serve as full-time (40 or more hours per week) Business Manager and Director of Public Service Broadcasting (Excelsior Ex. 5 at 1; Tr. 487). He proposes both to manage the "business and financial operations" of the FM station and to supervise "public/community relations." *Id.* He will not supervise any employees at the station (Tr. 487). He will not set policies in his capacity as Business Manager (Tr. 488).

26. Hooker currently is employed full-time as a congressional assistant in the Waco district office. In this position, he works in the community, meeting with constituents of the Congressman (Excelsior Ex. 5). Hooker's direct written case testimony states alternatively that he "will withdraw partially or, if necessary, resign from that position to pursue my commitment to the radio station" (Excelsior Ex. 5 at 2). If Excelsior's application is granted, he still intends to spend 20 hours per week working as a congressional assistant (Tr. 571). Hooker testified that he would work for the Congressman in the mornings and that he would work at the station from 1 a.m. until "5, 5:30, 6 o'clock" and eight hours on Saturday (Tr. 573-574).

27. Hooker also is currently employed as "senior pastor" of a church in Waco that has a membership of about 450 (Excelsior Ex. 5 at 2; Tr. 489). He receives a salary and is the "CEO" of the church (Tr. 490). He will not resign "his pastoral duties" should Excelsior's application be granted (Tr. 523). In his direct case written testimony, Hooker states that his "only actual time commitments" to the church are Sundays and Wednesday evenings between 7:30 and 9 p.m. On cross-examination at the hearing, however, Hooker concedes that his pastoral duties also include conducting weddings -- sometimes during the week (Tr. 492) -- conducting funerals (Tr. 493), attending his Boy Scout Troop meetings on Saturdays (Tr. 494), attending Baptist conventions (Tr. 497), participating at least three days in the annual Vacation Bible School (Tr. 524- 526), attending Deacon's meetings on Mondays (Tr. 529), visiting church members in local hospitals (Tr. 530-531) and attending some of the weekly meetings of the local Baptist Ministers Union (Tr. 498).

28. Hooker, who is black, has resided in Waco since 1979 (Tr. 504). From 1957-1969, Hooker was a senior pastor in Marlin, Texas and resided at a parsonage in Marlin (Tr. 499, 506). Hooker lived in Arlington, Texas from 1969 -1979 (Tr. 502, 508-509). During the years that Hooker resided in Marlin and Arlington, Hooker stayed from time to time at his parents' home in Waco, which Hooker claims was his second residence (Tr. 506, 509).

29. Hooker was President of the Conference of Christians & Jews from 1985 to 1986 (Excelsior Ex. 5) and was active in the organization's annual meeting and annual dinner (Tr. 511). He was President of the Down Town Kiwanis Club from 1987 to 1988, Trustee Board Chairman of McLennan Community College in 1986, and a Board Member of the Samaritan Counseling Center, in 1986 and 1987 (Excelsior Ex. 5). Hooker served on the Program Committee of the Waco Ministerial Association in 1985. He has been Chairman of the Civic Committee of the Baptist Minister's Union from 1980 to the present. He was Secretary of Waco Ministers Association from 1965 to 1966, and a member of the Baptist Ministers Union from 1980 to present (Excelsior Ex. 5). The Waco Ministerial Association and the Baptist Ministers Union are both professional organizations or associations of ministers (Tr. 512). Hooker has been dean of the Congress of Christian Workers (State), from 1970 to the present (Excelsior Ex. 5). The Congress of Christian Workers is a national organization. Hooker testified that he is no longer involved in that organization other than giving money (Tr. 512). He also acknowledged that this was a church related activity and it is in fact his church rather than himself personally that supports this organization financially (Tr. 513-514). He has been Assistant Secretary, Bills and Accounts, Missionary Baptist General Convention of Texas, from 1969 to the present (Excelsior Ex. 5). The Missionary Baptist General Convention is a convention of associations of Baptist Churches. It is one of 4 state conventions of Baptist Churches (Tr. 514-515). It is his church that is a member of that organization and his membership in the organization is by means of his membership in his church (Tr. 514-515).

30. Hooker has served on the Board of Directors of The United Way of McLennan County (Waco) from 1986 to the present (Excelsior Ex. 5). Hooker was an Advisor/Usher for the Good Hope Western District Association from 1988 to 1989 (Excelsior Ex. 5). The Good Hope Western District Association is another church association that is in the Baptist Convention. The church is a member of this association, his membership being by means of his membership in the church (Tr. 516-517). Hooker was a Board Member of the Habitat for Humanity from 1987 to 1988 (Excelsior Ex. 5). Hooker has been a member of the Coalition of Black Democrats from 1980 to the Present (Excelsior Ex. 5). Hooker was Assistant Council Commissioner of the Heart of Texas Council B.S.A. from 1960 to 1970, and a Field Commissioner for the B.S.A. from 1957 to 1970 (Excelsior Ex. 5). He has been a committee member of the Boy Scouts of America from 1970 to the present (Excelsior Ex. 5). Hooker has been a member of the NAACP from 1960 to the present (Excelsior Ex. 5). He has no involvement with the NAACP

other than giving money (Tr. 521). He was an Executive Board Member of the Doris Miller YMCA from 1959 to 1970 (Excelsior Ex. 5).

31. Since 1988 Hooker has been a member of the Advisory Committee for KCTF, a local public television station, which meets to discuss the format of the station, how the station would be run, and the public issues that the various members believe should be reflected in programming on the station (Excelsior Ex. 5). With respect to his involvement with the Advisory Committee, he has had no involvement other than attending meetings and from the time he became involved with this organization, he has only attended approximately 6 meetings (Tr. 521-522). He has had no time to attend meetings of that organization since this deposition in November, 1989 (Tr. 522).

32. *Marilyn Marshall* proposes to be the full-time (40 or more hours per week) General Manager (Excelsior Ex. 4 at 1). She proposes to coordinate and implement the station's "financial, personnel and management policies." *Id.* She proposes to "provide overall day-to-day direction for station operations" and to supervise all aspects of station operation. *Id.* Policies, however, will be set by the board of directors (Tr. 391).

33. If Excelsior's application is granted, Mr. Marshall will resign her full-time job at Paul Quinn College in Waco (Excelsior Ex. 4 at 1). In that event, she also proposes to move to Waco and to lease or sell her house in Harker Heights, Texas (Tr. 393-394; 401), which is outside the proposed service area of the station (Tr. 393-394)

34. Ms. Marshall, a black female, was appointed to the Financial Aid Advisory Board in 1987, which holds its meetings within Waco (Tr. 396, 400). Ms. Marshall has served in this position from 1987 through 1990. She has volunteered with that organization since 1980 (Excelsior Ex. 4). Ms. Marshall has been involved with the Girl Scouts of America in Waco since 1988 and has been a Board member of that organization from 1988 through 1991 (Excelsior Ex. 4; Tr. 400). Currently, Ms. Marshall also serves on the Financial Committee and the Executive Committee of this organization (Tr. 399). Ms. Marshall was a volunteer of the Arthritis Foundation in the year of 1989 (Excelsior Ex. 4). This organization holds its meetings in Waco (Tr. 400). Ms. Marshall has been active with the Family Abuse Center in Waco from 1987 through the present (Excelsior Ex. 4; Tr. 400). Her involvement with this organization has included picking up clothing, taking clothing to children, gathering furniture for individuals and soliciting donations from individuals (Tr. 401).

Diversification

35. None of Excelsior's principals have an interest of any kind in any other broadcast station or any other medium of mass communications (Excelsior Ex. 2).

Auxiliary Power

36. Excelsior proposes to install auxiliary power to insure continued service in the event of a power outage (Excelsior Ex. 7).

CHASE COMMUNICATIONS, INC.

Background

37. Chase Communications, Inc. is a Texas corporation. Its Articles of Incorporation were filed on June 26, 1987, in Austin, Texas (Tr. 722; Chase Exhibit 8). James P. Chase, III, owns 1,000 shares of the company's Class A voting common stock and his brother, Thomas G. Chase, Jr., owns 1,000 shares of the company's Class B non-voting common stock (Chase Ex. 1 at 1). Chase's Articles were amended in 1989 to reduce the company's authorized stock to 1,000 shares of Class A voting common stock and 1,000 shares of Class B non-voting common stock (Chase Ex. 9). James Chase had not realized until his deposition in 1989 that a greater number of shares had been authorized in the Articles as filed in 1987 (Tr. 670). The 1989 *pro forma* amendment of the Articles was on advice of FCC counsel (Tr. 670). The amendment to Chase's Articles was prepared by local counsel (Tr. 673), who advised James Chase that, under Texas law, his brother Thomas Chase's written consent to the amendment of the Articles was needed (Tr. 833).[2] Both James Chase and Thomas Chase thus signed a consent for the *pro forma* amendment (Chase Ex. 10; Tr. 834-835).

38. James Chase has been president, secretary, treasurer and the company's sole director since the application was filed at the FCC on June 30, 1987 (Chase Ex. 1 at 1). For approximately two business days prior to the filing of Chase's application at the FCC, Thomas Chase and Mary Chase (James Chase's spouse) served as initial directors of the company (Tr. 679-680). Thomas Chase and Mary Chase had been named in the Articles of Incorporation as initial directors because the company's local counsel, Ms. Beth Miller, advised James Chase prior to filing the Articles that he needed to name three initial directors (Tr. 675; 723-724). James Chase chose family members because someone outside of his family "would be harder to deal with than somebody in my family." (Tr. 682; Tr. 725). James Chase's family trusts his judgment about broadcasting (Tr. 725). Thomas Chase said nothing about being a director and did not care one way or another (Tr. 726). Also, James Chase saw "nothing wrong" with such appointments because he could overturn any action by the Board because of his status as sole voting shareholder (Tr. 724).

39. When FCC counsel learned from James Chase that his brother had been named an initial director in the Articles, counsel asked whether Texas law would permit a company to have just one director (Tr. 675; 723). Local counsel Miller promptly advised that having only one director would be possible but, because the Articles naming three initial directors had been filed on Friday, June 26, 1987, more paperwork would have to be prepared before the June 30 FCC filing deadline in order to reduce the board to only one director (Tr. 679). On Monday, June 29, 1987, Thomas Chase and Mary Chase signed written resignations from the board of directors (Chase Ex. 13) and James Chase executed a document, as sole shareholder, reducing the number of directors from three to one (Chase Ex. 12).

40. During their brief tenure as directors, Thomas Chase and Mary Chase, signed a "Consent of Directors in Lieu of Organizational Directors' Meeting" (KBC Ex. 5). The "Consent of Directors' (KBC Ex. 5) contained resolutions organizing the company, naming its officers and taking other organizational actions. However, there is no

evidence that Thomas Chase "actively participated" in formulating any of these decisions. Rather, James Chase asked Thomas Chase to sign this document on Monday, June 29, 1987, at the same time that James Chase requested Thomas Chase to sign a written resignation from the Board (Tr. 679; Chase Ex. 13). There was no "meeting" of the Board on June 29, 1987, to discuss or vote on these matters (Tr. 687). The "Consent of Directors" (KBC Ex. 5) had been prepared by James Chase's local counsel (Tr. 679). Thomas Chase had no input into any of the resolutions contained in that Consent of Directors (Tr. 843-845). James Chase had discussed the various resolutions in the Consent of Directors previously with local counsel (Tr. 845-859). There is no evidence that Thomas Chase even knows Ms. Miller, much less discussed this case with her (Tr. 792).

41. The record also establishes that Thomas Chase, Chase's non-voting stockholder, has not been actively involved in Chase's preparation and prosecution of its application. Thomas Chase was not involved in obtaining the applicant's reasonable assurance of financial qualifications (Tr. 688-689) and he will not be required to personally guarantee the bank loan (Tr. 690-691). In addition, he was not consulted about Chase's proposed tower site (Tr. 809). Also, he has never been a signatory on the corporate checking account (Tr. 810). Thomas Chase has never talked to local counsel, Beth Miller, and has never discussed the application with FCC counsel (Tr. 792, 852-853). Thomas Chase testified that his brother has asked questions at family gatherings about the FCC process (Tr. 802) or "How's it going?" (Tr. 803) and that he would attempt to give him status reports. He stated that he hasn't "told him particular details" about the application or details about "what we're doing" (Tr. 803). In this connection, James Chase acknowledged that he informed his brother about his own investigation into another applicant's (SEMFOT) tower site problems and that he gave him further updates about that investigation at Sunday lunches with his family. James Chase stated, however, that his brother had "no input" into the matter (Tr. 815), no knowledge of the procedures (Tr. 815), and nothing to do with it (Tr. 817). James Chase has never discussed with his brother any plans for the proposed FM station, including staffing and programming (Tr. 804). At the time of the hearing, James Chase had not seen his brother for six weeks (Tr. 818).

Integration

42. James Chase proposes to be the sole principal to be integrated into management (Chase Ex. 1 at 1). Upon a grant of his application, Chase proposes to withdraw from his employment with Chase and Co., a video production company that he has timely pledged to divest. *Id.* Chase further proposes to withdraw from any and all other business pursuits in order to devote a minimum of 40 hours per week as the day-to-day General Manager of the Station. *Id.* He currently has no other business pursuits (Tr. 663). His duties as General Manager will include supervision of the construction of the station, hiring of the station's employees and supervision of all station operations (Chase Ex. 1 at 1-2). He will exercise final policymaking authority for all facets of station operation, including programming, sales and employment. *Id.* at 2.

43. James Chase has resided within the city limits of Waco since his birth in 1951, except for four years in college at Austin, Texas (1969 to 1973) and a period (1977 to 1981) when he was employed at broadcast stations elsewhere in Texas (Chase Ex. 1 at 2, 4).

44. Chase has been a member of the Rotary Club of Waco from 1985 to the present (Chase Ex. 1). The Rotary year begins on July 1st (Tr. 708). He was Chairman of the Bulletin and Magazine Committee for the Rotary years 1987-1988 and 1988-1989, and was Editor of the club's weekly publication, FELL-O-SHIP" during the same years, 1987-1988 and 1988-1989 (Chase Ex. 1). The publication "FELL-O-SHIP" is published by the Bulletin and Magazine Committee. In addition to publishing this newsletter, the Committee prepared articles for submission to the National Rotary Magazine (Tr. 745). The publication "FELL-O-SHIP" is provided on a subscription basis and is included as part of the overall dues package when a person joins the Rotary Club. It contains articles concerning upcoming speakers, people active in Rotary and what they are doing and the projects in which Rotary is involved (Tr. 746). He also was a Citizenship Contest judge in 1988 and a member of the Youth Service Fund in 1988 (Chase Ex. 1). The Citizenship Contest involved selecting students for one major and two smaller scholarships. These activities were undertaken during the spring of the year, over a period of several months, in which 30 to 40 applicants were considered (Tr. 747). He has prepared and presented a newscast at Rotary meetings since 1988 (Chase Ex. 1). Rotary meetings are held every Monday. Chase does his newscast during these meetings every other month. It is a three minute presentation he makes as a part of the program, presented at the regularly scheduled luncheon meeting (Tr. 747-748).

45. Chase has been a volunteer for the United Way of Waco-McLennan County from 1983 to the present. He was a "Corporate Loaned Executive" in 1986, and was Producer of the Fundraising Video for the 1983-1984 and 1988-1989 campaigns (Chase Ex. 1). Other than doing a videotape production in 1983, Chase's only involvement with the United Way prior to 1986 involved giving money (Tr. 709). His activities with respect to corporate fundraising consisted of handling five or six "cards" and contacting the businesses whose cards he handled regarding contributing funds. In addition to the video and his corporate fundraising activities in 1986, Chase also produced a video in the summer of 1988 (Tr. 751).

46. Chase was a volunteer coordinator for the 11th Congressional District of Texas Bicentennial of the Constitution for the year 1987-1988 (Chase Ex. 1). In this capacity, Chase was invited to become a coordinator and send out information packets to teachers in the high school (Tr. 752). He organized a high school competition/TV Special which aired in Waco/Temple, Abilene and Austin, Texas in 1987 (Chase Ex. 1). He researched and distributed materials and gave talks to more than one thousand students in the Waco/Temple area during the Bicentennial year (Chase Ex. 1). In this regard, Chase developed a speech which he presented on the background of certain members of the Constitutional Convention. He does not recall specifically how many schools he spoke to, although he is certain there was only one high school (Tr. 754-755). He also made similar presentations to La Societe de Beaux Arts and the Waco council of Garden Clubs in 1987, both of which are women's organizations (Chase Ex. 1).

47. Chase has been a volunteer of the Waco Boys Club from 1986 to the present. He worked on fundraising and project development for "Mom and Dad for a Year" in 1987 (Chase Ex. 1). Chase's contribution consisted of attending several meetings at which he gave advice on how to improve fundraising efforts and providing a list of potential contributors (Tr. 755-756). He prepared and managed the PR campaign prior to "Steak 'N' Burger" Dinner in the spring of 1989 (Chase Ex. 1). The "Steak 'N' Burger" dinner is an annual event (Tr. 756).

48. Chase was host and producer of the Easter Seal Telethon for Waco from 1983 to 1985. He participated in separate fundraising for the Telethon in 1984 and 1985 (Chase Ex. 1). The Easter Seal Telethon is sponsored and produced by the Central Texas Rehabilitation Center (Tr. 756-757). Chase was Board Member and Treasurer of the Central Texas Rehibilitation Center (Waco) from 1984-1985 (Chase Ex. 1). Chase planned and prepared an advertising campaign for the St. Albans School, Waco, Texas, in 1984 (Chase Ex. 1).

49. Chase presented a seminar, "Who and What is Newsworthy", to the 1986-1987 class of leaders of Leadership Waco, selected by Waco Chamber of Commerce (Chase Ex. 1). His presentation represented a portion of a one-day seminar (Tr. 759). In 1989, Chase prepared and presented a talk on "Senior Citizens and the Media" to Inner City Ministry Waco (Chase Ex. 1).

50. Chase has been a member of the Central Presbyterian Church of Waco since 1983. He planned and directed media activities for the visiting National Moderator in 1989 (Chase Ex. 1). He did promotional work for Joan Campbell, who is "basically the head of the Church," with regard to certain seminars she conducts concerning "how to deal with people or how to help people after they are 'saved'" (Tr. 759).

51. Chase assisted homeowners of the Castle Heights Homeowners Association in a presentation before the city council on zoning concerns in 1989 (Chase Ex. 1). Castle Heights is the area in which he resides. There were two hearings at which he made presentations in opposition to a proposal to build a large overpass that would have passed his house (Tr. 760-761).

52. From October, 1981 to October, 1988, Chase was employed at KCEN-TV, Temple-Waco, Texas. He was employed as News Anchor/Producer from 1983 to 1988, during which time he anchored and produced evening newscasts and supervised reporters. He was employed as Morning Anchor/Producer from 1982 to 1983, during which time he originated and produced first early news show in the market. In 1981 he was employed as Bureau Chief-Waco, during which time he supervised reporters and news production. From January through October, 1981, he was employed at KOZY-FM, Dallas, Texas as News Writer and Anchor (Chase Ex. 1). This was not a regular 40 hour per week job, but instead involved an irregular schedule (Tr. 742). From May, 1979 through January, 1981 he was employed at KGNS-TV, Laredo, Texas, as News Director, News Anchor and Producer of evening newscasts. He supervised a staff of 10 and handled budget and hiring. From January, 1979 to May, 1979 he was employed at KMOL-TV, San Antonio, Texas, as a News Reporter. From January, 1977 to January, 1979, he was employed at KRIS-TV, Copus Christi, Texas, as a News Reporter. From 1969 to 1971, he was employed at KTAP-AM/K97FM, Austin, Texas, as an Announcer and News Anchor (Chase Ex. 1). This was a parttime position he held while in college in which he served as a parttime weekend announcer and news reporter (Tr. 743). In 1967 he was employed as a parttime announcer at KWTX-AM, Waco, Texas. From 1965 to 1966 he was employed as a parttime announcer at KEFC-FM, Waco, Texas (Chase Ex. 1).

Diversification

53. Neither Chase Communications, Inc. nor either of its two stockholders has any attributable media interests (Chase Ex. 2).

Auxiliary Power

54. Chase proposes to maintain emergency power generators at both its transmitter site and at its studio location for use in the event of power failure (Chase Ex. 3).

CONCLUSIONS

55. The three applicants have no media interests. In addition, all propose auxiliary power. Thus, diversification is not a factor in the comparative evaluation of the applicants. Also, all are entitled to a slight preference for proposing auxiliary power. Resolution of this case rests on the integration proposals of the applicants.

56. Excelsior receives 25% quantitative credit for Marshall's proposal to be the full-time General Manager. The integration credit is qualitatively enhanced by Marshall's female and racial preferences, her proposed future residence in Waco and her past civic involvement.

57. No integration credit will be awarded for King's and Hooker's proposed full-time commitment and Pollard's proposed 30 hour commitment. An applicant has the burden of proving how it will effectuate its integration proposal. *Cuban American Ltd.*, 5 FCC Rcd 3781, 3785 (1990). Excelsior has failed to demonstrate that these proposals are capable of effectuation. Here, King proposes to work full-time at the FM station and concurrently also serve as a tenured, full-time faculty member at Baylor University. King proposes to carry out his station duties by working various scattered hours including evenings and weekends. His hours of work at the station are in constant flux since it is dependent on his Baylor schedule. Hooker proposes to be full-time Business Manager and Director of Public Service Broadcasting and concurrently also be employed as a full-time senior pastor and to work 20 hours per week as a congressional assistant. Hooker proposes to carry out his station assignments in the afternoons, evenings and weekends. Pollard proposes to work 30 hours per week at the FM station as sales manager and concurrently also to be employed as the full-time Dean of Technical Education at McLennan Community College. Pollard proposes to work at the station evenings and weekends. When the current time commitments are added to proposed work commitments to the station, the record makes clear that King's, Hooker's and Pollard's total time commitments exceed the 70 hours per week which the Commission deems the absolute maximum which may be credited. *Jarad Broadcasting Co., Inc.*, 1 FCC Rcd 181, 189 (Rev. Bd. 1986). Also, King's and Hooker's intention to carry out their full-time responsibilities by working variuos scattered hours including evenings and weekends strains credulity and "does not constitute the type of 'fulltime' participation that the Commission contemplated in its *Policy Statement*, 1 FCC 2d at 395,[3] as warranting

substantial weight in the comparative process." *V. O. B. Incorporated*, FCC 90R-91, released October 17, 1990 (Rev. Bd.), paragraph 13. Pollard's proposal to serve as the station's sales manager during evening hours and weekends in contrast to salespersons working the normal business day is equally incredible and will not be credited. No part-time credit will be given to Excelsior for King's, Hooker's and Pollard's proposed participation since a determination can not be made on this record as to the precise number of hours they will be able to devote to the station. *See Cuban American Ltd., supra*, 5 FCC Rcd at 3785; *V. O. B., supra*, at paragraph 14.

58. KBW is entitled to 100% quantitative integration credit for the proposed fulltime integration of each of its two shareholders, Loy Lenamon (50%) and Jerry Lenamon (50%). KBC is also entitled to 50% gender credit for the integration of Loy Lenamon, based upon her female status. KBW is also entitled to substantial local residence credit for the lifelong residence of both of its principals within the community of license. Likewise, KBC receives enhancement credit for the civic activities of each of its principals in the community of license.

59. Neither Chase nor Excelsior have advanced record evidence sufficient to cast any serious doubt upon the Lenamons' ability to eliminate their current conflicting time commitments by turning over the day to day management and operation of their retail business to employees they propose to hire in the event KBC's application is granted. The fact that the Lenamons intend to continue to own the business and devote 3 hours per week to overseeing its operation in no way detracts from their respective 40 hours per week commitments to the station. Chase and Excelsior's arguments, built on nothing more than speculation and surmise, fail to undermine the Lenamon's ability to carry out their integration commitments. Consistent with *Cuban American, supra*, KBC has convincingly demonstrated that its principals can and will effectuate their integration proposals and 100% integration credit will be awarded.

60. None of the cases relied upon by Chase and Excelsior would support denying integration credit to KBC, based on the record developed in this proceeding. Thus, while Chase relies upon *Julia S. Zozaya*, 5 FCC Rcd 856, 858 (Rev. Bd. 1990), integration credit was denied in that case because the proponent anticipated simultaneously managing two different stations 135 miles apart. Those facts bear no relation to the circumstances of KBC and its principals. Likewise, *Ft. Collins Telecasters*, 103 FCC 2d 978, 985-986 (Rev. Bd. 1986), rev. den. 2 FCC Rcd 1790 (1987), aff'd No. 87-1256 (D.C. Cir. 1988), offers no support, inasmuch as that case addressed a situation where an integrated principal intended to retain business interests of which he was 100% owner and devoted 4-5 days per week and offered no indication that he intended to cut back on time currently devoted to those interests.

61. Similarly, in *Washoe Shoshone Broadcasting*, 3 FCC Rcd 3948, 3952-3953 (Rev. Bd. 1988) recon. den. 3 FCC Rcd 5631 (Rev. Bd. 1988), credit was denied where the party proposing integration had a franchise agreement requiring him to commit his fulltime efforts to the operation of the business and clearly stated that he did not intend to give up those interests. Here of course the Lenamons have no contractual obligation to continue to manage the retail store and have clearly indicated that they intend to turn the operation of the business over to hired help. Credit was, likewise, denied another applicant who was contractually obligated to solicit and procure insurance applications and who "represented vaguely" that he would "reduce his involvement" in the insurance business, so as not to interfere with his fulltime commitment. *Stanley Group Broadcasting, Inc.*, 3 FCC Rcd 5017, 5021-5022 (Rev. Bd. 1988). In *Knoxville Broadcasting Company*, 103 FCC 2d 669, 680-683 (Rev. Bd. 1986), an integration proposal was not credited where the principal was sole shareholder of a business that held a number of ongoing service contracts with U.S. government agencies, which had been awarded pursuant to the SBA Section 8(a) set-aside program and one of the primary eligibility requirements imposed under this program was fulltime involvement in the day to day management of the business and the preclusion of outside employment and other business interests.

62. *Anchor Broadcasting L.P.*, 5 FCC Rcd 2438 (Rev. Bd. 1990) involved an integrated principal who had failed to demonstrate how she would extricate herself from deep involvement in a family owned business. Not only have the Lenamons indicated how they will extricate themselves from day to day involvement with their bueinesses, they, likewise, do not suffer from any of the other deficiencies which plagued the applicant in *Anchor*. The applicant in *Margaret Garza*, 1 FCC Rcd 1294 (Rev. Bd. 1986) advanced a 40 hour per week integration proposal, while simultaneously proposing to continue to spend 7 to 10 days per month in Washington D.C., 3000 miles from the community of license, as a congressional administrative assistant. Similarly, in *Leininger-Geddes Partnership*, 2 FCC Rcd 3199 (Rev. Bd. 1987) integration credit was denied where the applicant pledged only to "diminish" the amount of time he devoted to his law practice, then 10 hours per day, and to his position as a member of the State Legislature, to which he devoted 60 days twice per year. Another principal was denied credit because he did not propose to give up his involvement in a business in which he spent a substantial amount of time on the west coast, while the community of license was in Arkansas. In *Caldwell Broadcasting Corp.*, 100 FCC 2d 115 (Rev. Bd. 1985) the Board refused to credit a 20 hour per week proposal, where the applicant intended to give priority to his law practice to which he devoted 40-60 hours per week, resulting in a total time commitment of 80 hours per week. Obviously, the Lenamons do not intend to give priority to their existing businesses nor do they propose a total time commitment anywhere near 60 hours per week, much less 60-80.

63. By contrast, the Commission has consistently awarded full integration credit where applicants, such as KBC, indicate on the record how they will eliminate current conflicting time commitments. Thus, in *Metro Broadcasting, Inc.*, 99 FCC 2d 688, 700 (Rev. Bd. 1984) the Board credited a proposal to turn complete control over management of an existing business to a recently hired trainee, with the caveat that, should this arrangement prove unsatisfactory, the applicant was prepared to sell the business. Even more significant, the Board fully credited a proposal in *Central Texas Broadcasting Co., Ltd.*, 90 FCC 2d 583 (Rev. Bd. 1982) where the integrated principal proposed to retain interests in 10 business entitles, including 3 banks and a mortgage banking company in each of which he was a director and Chairman of the Board. He specifically set forth a proposal indicating the number of hours he would devote to each of his outside businesses. In crediting his proposal the Board held that

his pledge to terminate any outside interest in the event it interfered with integration pledge should have been credited by the ALJ. In *Hispanic Owners, Inc.*, 99 FCC 2d 1180, 1189 (Rev. Bd. 1985) a proposal was credited, where the applicant proposed to sell an existing business dispite the fact that no prospective buyer had been identified. Most recently, in *Achernar Broadcasting Company*, 1 FCC 90R-98, released October 30, 1990, the Review Board upheld an award of fulltime credit where the applicant's total work week was in the 50-60 hour range.

64. In addition, even though the Lenamons intend to limit their outside time commitments to 3 hours and 5 hours respectively, it should be noted that integration proposals involving totals in 60 to 70 hours per week range have been credited in a number of cases. *Peoples Broadcasting Corp.*, 94 FCC 2d 429, 435-436 (Rev. Bd. 1983); *Brownfield Broadcasting Corp.*, 93 FCC 2d 1197, 1199-1200 (Rev. Bd. 1983); *Central Texas, supra*; *Bradley, Hand & Triplett*, 89 FCC 2d 657, 660-661 (Rev. Bd. 1982); *Radio Jonesboro, Inc.*, 96 FCC 2d 1106, 1108 (1984); *Hugh M. McBeath*, 103 FCC 2d 386, 389 (Rev. Bd. 1986).

65. Chase receives 100% integration credit for the fulltime participation of James Chase as the General Manager of the proposed station. Chase's proposal is enhanced by his longtime local residence, civic credit and broadcast experience.

66. KBC and Excelsior argue that only 50% integration credit should be awarded to Chase because of the alleged active involvement of non-voting shareholder Thomas Chase in the applicant's affairs. However, the evidence presents no serious question regarding the likelihood of James Chase's effectuation of his fulltime integration pledge or that he, as sole voting shareholder, is and will be in sole control of the proposed radio station. Simply put, there is no evidence that Thomas Chase has participated in any aspect of decision making for the applicant. KBC and Excelsior principally rest their argument on the fact that (1) Thomas Chase was named in the Articles and served for two business days prior to the filing of the Waco FM application as an "initial director"; (2) Thomas Chase was requested by James Chase in 1989 to sign a consent, as Class B non-voting shareholder, to amend the Articles reducing the number of authorized Class A and Class B shares; and (3) James Chase has talked to his brother from time to time about the application. All of these matters were fully explored at the hearing. The record makes clear that the naming of Thomas Chase as an initial director and his later signing of the Consent to amend the Articles was done on the advice of counsel. Moreover, there is not even a scintilla of evidence suggesting that Thomas Chase has participated in the formulation of any decision regarding the applicant prior to or following the filing of the application. Also, the record makes clear that the discussion between the brothers were limited to brief status reports. In this conection, there have been no discussions of any plans for the proposed station, such as staffing and programming. Nor is there any evidence that Thomas Chase has provided input into any aspect of the prosecution of the application. In sum, there is no record evidence of active participation by Thomas Chase. The evidence establishes, to the contrary, that Thomas Chase is a "passive" investor. Unlike the facts in *Coast TV*, 5 FCC Rcd 2751, 2752-2753 (1990), cited by Chase's opponents, there is no basis for treating Thomas Chase as an active owner for integration purposes. Full integration credit is warranted.

67. In summary, Excelsior receives 25% integration credit and KBC and Chase each reach 100% integration credit. As between KBC and Chase, KBC is the winner. KBC prevails since its qualitative enhancements are superior to that of Chase. KBC is entitled to a slight preference over Chase on the basis of past local residence. The Lenamons and James Chase are long term residents of Waco. However, unlike the Lenamons who resided outside the community for a brief period in 1971-1972, Chase has been absent from the city for some eight years including a four year period from 1977 to 1981 when he was employed at broadcast stations elsewhere in Texas. In addition, only KBC offers any female enhancement (50%). Both KBC and Chase are entitled to credit for participation in civic activities. The credit each receives is essentially cross-cancelling and neither warrants a preference over the other. Only Chase is entitled to broadcast experience. However, broadcast experience is deemed to be of minor significance. *Policy Statement, supra*, 1 FCC 2d 393, 396 (1965). KBC's local residence and female enhancement preference easily overcome Chase's broadcast experience advantage. The public interest will, therefore, be served by a grant of KBC's application. Accordingly, IT IS ORDERED, That unless an appeal from this Initial Decision is taken by a party, or it is reviewed by the Commission on its own motion in accordance with Section 1.276 of the Rules,[4] the application of Kennelwood Broadcasting Company, Inc. for a construction permit for a new FM Station on Channel 233A in Waco, Texas IS GRANTED; and the applications of Excelsior Communications, Inc. and Chase Communications, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge

FOOTNOTES

[1] The application of Richards Communications, Inc. was dismissed for failure to prosecute. *See Order*, FCC 89M-2249, released September 11, 1989. The application of Southwest Educational Media Foundation of Texas, Inc. was dismissed pursuant to a partial settlement. *See Memorandum Opinion and Order*, FCC 90M-784, released April 12, 1990.

[2] Articles 4.03A of the Business Corporation Act of Texas provides that holders of outstanding shares of any class entitled to vote on a proposed amendment by provisions of the Articles shall be entitled to vote as a class if the amendment would change the number of shares (Tr. 827-828).

[3] *Policy Statement on Comparative Broadcast* Hearings, 1 FCC 2d 393 (1965).

[4] In the event exceptions are not filed within 30 days after the release of this Initial Decision, and the Commission does not review the case on its own motion, this Initial Decision shall become effective 50 days after its public release pursuant to Section 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

Gen. Docket No. 90-54[1]
Gen. Docket No. 80-113

In re

Amendment of Parts 21, 43, 74, 76, 78, and 94 of the Commission's Rules Governing Use of the Frequencies in the 2.1 and 2.5 GHz Bands Affecting:

Private Operational-Fixed Microwave Service,
Multipoint Distribution Service,
Multichannel Multipoint Distribution Service,
Instructional Television Fixed Service, and
Cable Television Relay Service

ERRATUM

Released: October 30, 1990

1. On October 26, 1990, the Commission released a *Report and Order* (FCC 90-341) in the above-captioned proceeding. Paragraph 107 should read as follows:

107. IT IS FURTHER ORDERED that this *Report and Order* will be effective 30 days after publication in the Federal Register, except as follows:

(1) Sections 1.227(b)(4), 21.28(e), 21.901(d)(2), 21.912, and 21.914 of the Commission's Rules, 47 C.F.R. §§ 1.227(b)(4), 21.28(e), 21.901(d)(2), 21.912, 21.914, are effective upon publication of a summary of this *Report and Order* in the Federal Register;

(2) * * *

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

FOOTNOTE

[1] General Docket No. 90-54 also includes issues raised and comments filed in PR Docket No. 88-191, which was terminated by action of February 8, 1990. *Report and Order* in PR Docket No. 88-191, 5 FCC Rcd 1220.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE
Released: November 13, 1990

LOCAL EXCHANGE CARRIERS FILE REVISIONS TO THEIR COST ALLOCATION MANUALS

PUBLIC COMMENT INVITED

The following local exchange carriers recently filed proposed revisions to the cost categories of their permanent cost allocation manuals for the separation of regulated and unregulated costs: Cincinnati Bell Telephone Company, NYNEX Telephone Companies, Nevada Bell, Pacific Bell, Southern New England Telephone Company and United Telephone System. Parties may file comments on the proposed revisions to the cost manuals no later than **December 7, 1990.** Replies should be filed by **December 21, 1990.** A copy of each pleading should be sent to Alicia Dunnigan, FCC, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554 and to International Transcription Services, Inc., 2100 M Street, N.W., Washington, D.C. 20036, (202) 857-3800. Copies are available for public inspection and copying in the Accounting and Audits Division public reference room, 2000 L Street, N.W., Room 812, Washington, D.C. Copies are also available from ITS.

For further information contact Alicia Dunnigan, (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TRT/FTC COMMUNICATIONS, INC. File No. I-T-C-90-108

Application for authority to acquire and operate capacity in the PTAT-1 cable system for the provision of authorized common carrier service between the U.S. and the United Kingdom

ORDER AND AUTHORIZATION

Adopted: October 18, 1990; Released: November 13, 1990

By the Chief, International Facilities Division:

1. The above-captioned application filed on May 11, 1990 by TRT/FTC Communications, Inc. (TRT/FTC), requests authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to acquire and operate capacity in the Private Transatlantic Telecommunications Cable System (PTAT-1) for the provision of authorized common carrier services between the U.S. and the United Kingdom and beyond. The application was placed on public notice on May 16, 1990. No comments were received.

2. TRT/FTC is a non-dominant communications carrier authorized to provide common carrier services between the U.S. and the United Kingdom.[1] TRT/FTC previously has been authorized to acquire and operate circuits for service to the United Kingdom.[2] TRT/FTC is now requesting authority to acquire and operate the western half-interest in one DS-2 circuit (6.312 megabits per second) for service to the United Kingdom. TRT/FTC indicates that it will use the requested capacity in PTAT-1 to supplement existing facilities to accommodate continued growth in its U.S.-United Kingdom services and to satisfy private line customers specifying PTAT-1 routing.

3. The Commission stated in its Private Submarine Cable decision [3] that it would require common carriers wishing to acquire capacity in PTAT- 1 to file applications pursuant to Section 214 of the Communications Act.[4] In this context, we find that TRT/FTC's application contains all of the information necessary under Section 63.01 of the Commission's Rules.[5] Furthermore, we find that TRT/FTC's application does not raise any economic impact issues.[6]

4. Upon consideration of the applications and in view of the foregoing, we find that authorization of the requested facilities and services is required by the public convenience and necessity.

5. Accordingly, IT IS ORDERED that application File No. I-T-C-90-108 IS GRANTED, and TRT/FTC is authorized to:

a. acquire on an IRU basis, a one-half interest in one DS-2 circuit in the PTAT-1 cable;[7]

b. acquire and operate necessary domestic connecting facilities; and

c. utilize said facilities to provide TRT/FTC's regularly authorized services between the U.S. and the United Kingdom and beyond with the exception of France.

6. IT IS FURTHER ORDERED that this authorization is issued subject to the terms and conditions of any license issued to Private Transatlantic Telecommunications Systems, Inc. under the act entitled "An Act relating to the landing and operation of submarine cables in the United States" (47 U.S.C. §§34-39).

7. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities
Division
Common Carrier Bureau

FOOTNOTES

[1] TRT/FTC recently merged with FTC Communications, Inc. (FTCC) with TRT/FTC being the surviving company. *See* letter to Pacific Telecom, Inc. dated June 20, 1990, File Nos. CSG-90-027-(5)AL and I-T-C-90-067-TC, from the Chief, International Facilities Division. In FTC Communications, Inc., 4 FCC Rcd 5633 (Com. Car. Bur. 1989) (hereinafter *FTCC Ruling*), because of changes in its ownership structure, FTCC was reclassified as non-dominant under the provisions of International Competitive Carrier Policies, 102 FCC 2d 812 (1985), *recon. denied*, 60 R.R. 2d 1435 (1986) (*International Competitive Carrier*). However, FTCC was determined to be a dominant carrier for the provision of all services between the U.S. and France because of an exclusive "gateway" arrangement with France Telecom for switched voice services. As a result of the merger, TRT/FTC is now deemed to be a dominant carrier for the provision of all services between the U.S. and France.

[2] *See* AT&T Co., 98 FCC 2d 440 (1984) and American Telephone and Telegraph Company, 4 FCC Rcd 1129 (Com. Car. Bur. 1988). We also note that FTCC, which has been merged into TRT/FTC, previously has been authorized to acquire circuits in the PTAT-1 cable system. *See* CICI, Inc., 4 FCC Rcd 6622 (Com. Car. Bur. 1989), FTC Communications, Inc., 5 FCC Rcd 3328 (Com. Car Bur. 1990) and TRT/FTC, 5 FCC Rcd 3853 (Com. Car. Bur. 1990).

[3] Tel-Optik, Ltd., 100 FCC 2d 1033 (1985).

[4] This requirement was restated in *International Competitive Carrier*, where the Commission determined that it would require non-dominant carriers to file applications to acquire capacity from any future private cable sources. *International Competitive Carrier*, 102 FCC 2d at 845.

[5] The Commission places no special burdens on any carrier making an application for private cable capacity. *See* Pacific Telecom Cable, Inc., Request for Clarification of Policies Concerning Use of Independent International Cables, File No. ISP-89-002, 4 FCC Rcd 4454 (1989) (*Independent Cable Policies*).

[6] The Commission stated in *Independent Cable Policies*, 4 FCC Rcd at 4456, that it has authority under its public interest mandate under Section 214 of the Communications Act to consider *sua sponte* any economic impact issues, including traffic diversion issues, that may be raised in an application by a common carrier to acquire private cable capacity or to consider such issues when raised by third parties filing comments in response to an application. However, the Commission has stated that it does not anticipate that common carrier acquisition of private cable capacity will normally give rise to such issues. Even if an applicant seeks to acquire a substantial amount of private cable capacity and to offload capacity on a common carrier cable or change a prior commitment for use of capacity in planned common carrier facilities, the Commission stated that the presence of these factors would not be conclusive evidence of economic harm. The Commission further stated that the "[r]esolution of any economic impact issues that may arise, and a determination of whether grant of the application would serve the public interest, would be dictated by the circumstances of the particular case before us." *Id.*

[7] TRT/FTC states that Mercury Communications, Ltd., its correspondent in the U.K., has agreed to provide the matching eastern half of the international facilities as well as connecting facilities in the U.K. TRT/FTC also notes that it will pay the western owners of the PTAT-1 cable approximately $2,150,000 and in addition, will incur quarterly maintenance charges.

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: November 13, 1990

PLEADING CYCLE ESTABLISHED FOR COMMENTS ON FOUR WISCONSIN INDEPENDENT TELEPHONE COMPANIES' PETITION FOR WAIVER OF COMMISSION'S EQUAL ACCESS IMPLEMENTATION REQUIREMENTS FOR INDEPENDENT TELEPHONE COMPANIES

On August 10, 1990, the Commission received a petition for waiver filed by Larsen-Readfield Telephone Company (Larsen-Readfield), Monroe County Telephone Company (Monroe County), Solon Springs Telephone Company (Solon Springs), and Wittenberg Telephone Company (Wittenberg). The petitioners seek separate waivers of the Commission's equal access implementation requirements for independent telephone companies.

In March 1988, all four independent telephone companies received a letter from MCI Telecommunications Corporation (MCI) requesting that they convert their facilities to equal access. Pursuant to Commission order, the companies are required to complete the equal access conversion within three years of the request date. *See MTS and WATS Market Structure*, CC Docket No. 78-72, Phase III, 100 FCC 2d 860 (1985), *Report and Order*. The three year time period will end in March 1991. The petitioners state that, for various reasons, they require additional time -- twelve to sixteen months -- to complete the equal access conversions. The petition states that MCI has agreed to the new dates of completion.

Larsen-Readfield and Monroe County seek an additional sixteen months, until July 15, 1992, while Solon Springs requests an extension of fourteen months, until May 13, 1992. These three companies state that the additional time is necessary because the conversion process has placed a burden on their capital, equipment, and personnel resources. The companies state that their parent company, Century Telephone Enterprises, Inc. (Century), is now implementing equal access for its affiliates in Michigan and Wisconsin. The companies contend that this implementation program, which involves the conversion of 4,500 access lines each quarter, has required that Century devote substantial capital, equipment, and personnel. Thus, Century cannot administratively accommodate the Larsen-Readfield, Monroe County and Solon Springs conversions before 1992.

Wittenberg requests an additional year, until March 1992, to complete the conversion to equal access. Wittenberg argues that the conversion will require upgrades for its switches, and that it has experienced delays in obtaining a proposal for equal access upgrades from the switch manufacturer. Wittenberg anticipates that the equipment and software should be delivered, installed, tested, and operational by March, 1992.

In addition, Wittenberg states that it has applied to the Wisconsin Public Service Commission (WPSC) for state authorization to incur the expenses associated with the equal access conversion. Wittenberg requests that the proposed completion date of March 1992 be conditioned upon Wittenberg receiving WPSC authorization.

Interested parties should file comments on this petition by **December 4, 1990,** and reply comments by **December 19, 1990,** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Peggy Reitzel, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's contractor for public service records duplication: International Transcription Services, Inc. (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C. 20037. Copies of the petition can be obtained from ITS at (202) 857-3800.

For further information contact Peggy Reitzel, Policy and Program Planning Division of the Common Carrier Bureau, at (202) 632-4047.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

EAGLE UPLINK CORPORATION — File No. CSG-89-170-ML

Application for authority to modify its license for a 2.44-meter Ku-band transmit/receive earth station at Memphis, Tennessee for the provision of services between the United States and Canada via the GE Americom K-1 satellite

SAT - NETWORKS INTERNATIONAL — File No. CSG-90-006-P/L

Application for authority to construct and operate a 3.7-meter fixed Ku-band transmit/receive earth station at Jamul, California for communications between the headquarters location and various points in Mexico via the Morelos satellite system

GTE SPACENET CORPORATION — File No. CSG-90-028(4)-ML

Application for authority to modify its licenses for network of fixed 1.8, 3.5, 3.7 and 4.6-meter VSAT Ku-band transmit/receive earth stations (Call Signs E890526, E890532, E890533 and E890534) for the provision of transborder services between the United States via all U.S. domestic satellites and the Anik and Morelos systems

AUBURN UNIVERSITY — File No. CSG-90-045-ML

Application for authority to modify its license for a 7.0-meter fixed Ku-band transmit/receive earth station (Call Sign E890580) at Auburn University, Alabama for the provision of television service via the PAS-1 satellite between the United States and all points which PAS is authorized to serve

AUBURN UNIVERSITY — File No. CSG-90-050-ML

Application for authority to modify its license for a 10.0-meter fixed C-band transmit/receive earth station (Call Sign E890634) at Auburn University, Alabama for the provision of television service via the PAS-1 satellite between the United States and all points which PAS is authorized to serve in the Western Hemisphere

TRANSPORT COMMUNICATIONS, INC. — File No. CSG-90-053(3)-ML

Application for authority to modify its license for a 6.1-meter hub at Sterling Heights, Michigan and up to 150 each 1.8 and 2.4-meter VSAT remote Ku-band transmit/receive earth stations (Call Signs E890114, E890115 and E890116) for the provision of transborder services between the United States and Canada and Mexico via the Anik and Morelos satellite systems and all U.S. domestic satellites

AMERICAN SATELLITE COMPANY d/b/a Contel ASC — File No. CSG-90-056-ML

Application for authority to modify its license for a 4.57-meter fixed Ku-band transmit/receive earth station (Call Sign E900333) at Irving, Texas for the provision of services between the United States and Canada via all U.S. domestic satellites

AMERICAN SATELLITE COMPANY d/b/a Contel ASC — File No. CSG-90-057-ML

Application for authority to modify its license for a 4.57-meter fixed Ku-band transmit/receive earth station (Call Sign E90334) at Thornwood, New York for the provision of transborder services between the United States and Canada via all U.S. domestic satellites

GROUP W TELEVISION, INC. — File No. CSG-90-059-ML

Application for authority to modify its license for a 7.0-meter fixed Ku-band transmit/receive earth station (Call Sign E900400) at Stamford, Connecticut for the provision of television service via the PAS-1 satellite between the United States and all points which PAS is authorized to serve

AMERICAN SATELLITE COMPANY d/b/a Contel ASC — File No. CSG-90-064-ML

Application for authority to modify its license for a 4.57-meter fixed Ku-band transmit/receive earth station (Call Sign E900401) at Briarcliff Manor, New York for the provision of transborder services between the United States and Canada via all U.S. domestic satellites

AMOCO CORPORATION — File No. CSG-90-067-ML

Application for authority to modify its license for a 9.1-meter C-band transmit/ receive earth station (Call Sign E881258) at Tulsa, Oklahoma to permit the provision of services between the United States and Canada via all U.S. domestic satellites

CIRCUIT CITY STORES, INC. — File No. CSG-90-076(3)-ML

Application for authority to modify its licenses for a network of up to 650 1.8-meter and 150 2.4-meter VSAT Ku-band transmit/receive earth stations (Call Signs E900469 and E900468) and a 6.1-meter hub (Call Sign E900467) in Richmond, Virginia for the provision of transborder services via all U.S. domestic satellites

NISSAN MOTOR CORPORATION — File No. CSG-90-077-P/L

Application for authority to construct and operate a 3.6-meter Ku-band transmit/ receive earth station in Gardena, California for the provision of services between the United States and Mexico via the Morelos II satellite

TOYOTA MOTOR SALES, U. S. A. INC. — File No. CSG-90-078(3)-ML

Application for authority to modify its licenses for network of up to 2700 fixed 1.8 and 300 2.4-meter VSAT Ku-band transmit/receive earth stations (Call Signs E890089 and E890090) and a 6.1-meter hub at Torrance, California (Call Sign E890088) for the provision of transborder services between the United States and various transborder locations via all U.S. domestic satellites and the Anik and Morelos satellite systems

EASTMAN KODAK COMMUNICATIONS, INC. — File No. CSG-90-079-P/L

Application for authority to construct and operate a 3.5-meter Ku-band transmit/ receive earth station at Dallas, Texas for the provision of services between the United States and Guadalajara, Mexico via the Morelos II satellite

CONTEL FEDERAL SYSTEMS, INC. — File No. CSG-90-082-ML

Application for authority to modify the license for its 9.1-meter C-band transmit/receive earth station at West Palm Beach, Florida to provide transborder services via U.S. domestic satellites and international services via the PAS system

AMERICAN SATELLITE COMPANY d/b/a Contel ASC — File No. CSG-90-091-ML

Application for authority to modify its license for an 8.1-meter fixed Ku-band transmit/receive earth station (Call Sign E8590) at Houston, Texas for the provision of transborder services between the United States and those countries consulted under Article XIV(d) of the INTELSAT Agreement

HAMILTON COMMUNICATIONS CONSULTANTS, INC. — File No. CSG-90-093-ML

Application for authority to modify the license for its 9.2-meter Ku-band transmit/ receive earth station in Orange, New Jersey (Call Sign E860008) to communicate with the PAS-1 satellite to provide service to all points which PAS is authorized to serve

MEMORANDUM OPINION, ORDER AND AUTHORIZATION

Adopted: October 31, 1990; Released: November 14, 1990

By the Chief, International Facilities Division:

1. The Commission has under consideration the above-captioned applications requesting authority under Title III of the Communications Act of 1934, as amended, to modify existing domestic satellite earth station licenses

and construct new earth station facilities, to provide transborder services between the United States and Canada, Mexico, Latin America and the Caribbean. The Commission also has under consideration applications to modify existing earth station licenses to add the PAS-1 satellite as a point of communications to provide service between the United States and points to which Alpha Lyracom (d/b/a Pan American Satellite (PAS)) is authorized to serve. The applications were placed on the Commission's public notice. No comments were received.

THE APPLICATIONS

2. *Eagle Uplink Corporation (EUC, formerly doing business as Cylix Communications Corporation* [1]*) (File No. CSG - 89 - 170 - ML).* EUC seeks authority to modify its license for a 2.44-meter Ku-band transmit/receive earth station at Memphis, Tennessee (File No. CSG-89-117-P/L) for the provision of transborder services between the United States and Canada via the GE Americom K-1 satellite. EUC holds previously granted authority to use this facility with the Anik and Morelos satellite systems for the provision of transborder communications. EUC proposes to add the GE Americom K-1 satellite as a point of communication for the provision of private, non-common carrier transborder data services from the United States to Canada. EUC states that the addition of the K-1 satellite is a logical expansion of the transborder authority previously granted because INTELSAT facilities would be uneconomical and technically inappropriate for the provision of the subject services. EUC states that the present authorization is required to support the communications needs of one of its domestic customers which has a limited number of facilities in Canada. Thus, EUC notes that the service contemplated herein would be ancillary to EUC's provision of domestic service to the customer. EUC states that it already has communications facilities and transponder capacity in place that can serve this customer's transborder needs. There are no technical modifications to the earth station.

3. *Sat - Networks International (Sat - Networks) (File No. CSG - 90 - 006 - P / L).* Sat-Networks seeks authority to construct and operate a 3.7-meter fixed Ku-band transmit/receive earth station at Jamul, California for communications between its headquarters location and various points in Mexico via the Morelos system. Sat-Networks states it will operate as a hub facility connecting various Mexican companies' VSAT networks to the United States. The construction of this proposed facility meets the historical requirements of the State of California and will cause no major environmental impact. The antenna sidelobe pattern does not meet the requirements of Section 25.209(a) of the Commission's Rules. Therefore, the power into the antenna is limited so that the station will be in compliance with the Commission's requirements for 2^0 spacing.

4. *GTE Spacenet Corporation (GTE) (File No. CSG-90-028 (4) - ML).* GTE seeks authority to modify the licenses for its network of fixed 1.8, 3.5, 3.7 and 4.6-meter very small aperture terminal (VSAT) Ku-band transmit/receive earth stations (Call Signs E890526, E890532, E890533 and E890534, File Nos. 258-DSE-MP/L-90, 259-DSE-MP/L-90, 260-DSE-MP/L-90 and 261-DSE-MP/L-90) for the provision of services between the United States and Canada, Mexico, the Caribbean and Latin America via all U.S. domestic satellites as well as the Canadian Anik (C1, C2, C3, D1, D2, E1 and E2) and Morelos satellite systems. GTE states that the modification will apply to a part of its Skystar 300 Point-to-Point (Skystar) earth station network. Skystar earth stations are presently used domestically for a two-way private channel system supporting high speed digital communications and use GTE's authorized multi-satellite system to provide capacity for digital networks. GTE states that several of its customers have business requirements which necessitate transborder links to Canada and Mexico and the Caribbean. There are no technical modifications to the earth stations.

5. *Auburn University (Auburn) (File Nos. CSG-90-045 - ML and CSG - 90 - 050 - ML).* In File No. CSG-90-045, Auburn seeks authority to modify its license for a 7.0-meter fixed Ku-band transmit/receive earth station (Call Sign E890580, File No. 1237-DSE-P/L-89) at Auburn University, Alabama to add the PAS-1 satellite as a point of communication for television service between the United States and all points which PAS is authorized to serve in Europe. Auburn states that it wishes to use PAS-1 for the transmission of educational, instructional and information materials consistent with the educational and instructional needs of the university. Auburn states that its use of PAS will be on a non-common carrier basis, not interconnected with the public switched network, and as part of a long-term lease. Satellite Radio Branch, Domestic Facilities Division, will issue a corrected license to reflect the remote control point, number of antennas (1), and proper coordinates. All other technical modifications shall be consistent with Auburn's application.

6. In File No. CSG-90-050-ML, Auburn seeks authority to modify its license for a 10.0-meter fixed C-band transmit/receive earth station (Call Sign E890634, File No. 1363-DSE-P/L-89) at Auburn University, Alabama to add as a point of communication the PAS-1 satellite for television service between the United States and all points in the Western Hemisphere which PAS is authorized to serve. Auburn proposes to use the PAS-1 satellite for the transmission of educational, instructional and information materials consistent with the educational and instructional needs of the university. Auburn states that its use of PAS-1 will be on a non-common carrier basis, not interconnected with the public switched network and as part of a long-term lease. Satellite Radio Branch, Domestic Facilities Division, will issue a corrected license to reflect the number of antennas (1), antenna gains, and proper powers. All other technical modifications shall be consistent with Auburn's application.

7. *Transport Communications, Inc. (Transport) (File No. CSG - 90 - 053 (3) - ML).* Transport seeks authority to modify its license for a 6.1-meter hub at Sterling Heights, Michigan and up to 150 each 1.8-meter and 2.4 VSAT remote Ku-band transmit/receive earth stations (Call Signs E890114, E890115 and E890116, File Nos. 335-DSE-P/L-89, 336-DSE-P/L-89 and 337-DSE-P/L-89) for the provision of international services between the United States and Canada and Mexico via all U.S. domestic satellites, the Anik (C1, C2, C3, D1, D2, E1 and E2) and Morelos satellite systems. Transport proposes to offer on a private, non-common carrier basis, transborder point-to-multipoint digital voice and data services between the United States and Canada and between the United States and Mexico. Transport states that the addition of U.S. satellites, Anik and Morelos systems will not entail any technical modifications to its existing earth stations.

8. *American Satellite Company, d / b / a Contel ASC (ASC) (File Nos. CSG - 90 - 056 - ML, CSG - 90 - 057 - ML, CSG - 90 - 064 - ML and CSG - 90 - 091 - ML).* In File Nos. CSG-90-056-ML, CSG-90-057-ML and CSG-90-064-ML, ASC seeks authority to modify the licenses for its 4.57-meter fixed Ku-band transmit/receive earth stations at Irving, Texas (Call Sign E900333, File No. 1065-DSE-P/L-90), Thornwood, New York (Call Sign E900334, File No. 1065-DSE-P/L-90), and Briarcliff Manor, New York (Call Sign E900401, File No. 1147-DSE-P/L-90) respectively, for the provision of transborder services between the United States and Canada via all U.S. domestic satellites. ASC states these earth stations will communicate with similar stations licensed to it as hub earth stations in a multi-hub VSAT network, as well as with VSATs licensed to ASC's customers, some of which are located in Canada. There will be no technical modifications to its earth stations.

9. In File No. CSG-90-091-ML, ASC seeks authority to modify its license for an 8.1-meter fixed Ku-band transmit/receive earth station (Call Sign E8590, File No. 1523-DSE-MP/L-90) at Houston, Texas for the provision of transborder services between the United States and various countries via all satellites that have been consulted under Article XIV(d) of the INTELSAT Agreement.[2] ASC states that the instant modification will allow it to provide transborder satellite services to a customer requesting such service to Mexico. ASC states that it has analyzed the radio frequency radiation environment in and around the station and found it to be safe for continuous exposure of operating personnel and the general public. There will be no technical modifications to its earth stations.

10. *Group W Television, Inc. (Group W) (File No. CSG - 90 - 059 - ML).* Group W seeks authority to modify its license for a 7.0-meter fixed Ku-band transmit/receive earth station (Call Sign E900400, File No. 1146-DSE-P/L-90) at Stamford, Connecticut for the provision of television service via the PAS-1 satellite between the United States and all points which PAS is authorized to serve. Group W states that this request is required to increase transmission capacity for the distribution of video program material and will allow one of its divisions to perform satellite distribution services for customers served by the cable television and broadcast industries and business video users. Group W states that its use of PAS-1 will be in accordance with the parameters set forth in Attachment Number 1 to the Report by the Board of Governers to the 11th Assembly of Parties pursuant to Article XIV(d) on the PanAmSat Network, AP-11-10E. The technical modifications to its earth station shall be consistent with Group W's application.

11. *Amoco Corporation (Amoco) (File No. CSG - 90 - 067 - ML).* Amoco seeks authority to modify its license for a 9.1-meter C-band transmit/receive earth station (Call Sign E881258, File No. 2751-DSE-P/L-88) at Tulsa, Oklahoma for the provision of transborder business services between the United States and Calgary, Canada via the Galaxy III domestic satellite. Amoco states that it will provide services for private use to Calgary, Canada. There are no technical modifications to the earth station.

12. *Circuit City Stores, Inc. (Circuit City) (File No. CSG - 90 - 076 (3) - ML).* Circuit City seeks authority to modify its licenses for a network of up to 650 1.8-meter and 150 2.4-meter VSAT Ku-band transmit/receive earth stations (Call Signs E900469, File No. 1323-DSE-P/L-90 and E900468, File No. 1322 DSE-P/L-90), respectively, and a 6.1-meter hub (Call Sign E900467, File No. 1321-DSE-P/L-90) in Richmond, Virginia for the provision of transborder services between the United States and Canada, Mexico, and certain Latin American countries via all U.S. domestic satellites. Circuit City states that it currently has 175 stores in the United States and is experiencing an average growth rate of 40 stores per annum. Each Circuit City branch office uses high speed computers to control inventory and process customer orders. Circuit City states that this proposed computer network will be an integral part of the company's effort to increase customer service and product availability by providing high speed transmission of data, voice and video between branch offices and the Richmond hub office. There are no technical modifications to the subject earth stations.

13. *Nissan Motor Corporation (Nissan) (File No. CSG - 90 - 077 - P / L).* Nissan seeks authority to construct and operate a 3.6-meter Ku-band transmit/ receive earth station in Gardena, California for the provision of services between the United States and Mexico via the Morelos II satellite. Nissan states that it operates as a sales and distributing arm of its parent company, Nissan Motor Co., Ltd, a Japanese automobile manufacturing corporation. The parent has several subsidiaries, including the applicant, in the United States which are interconnected by a communications network comprised of a combination of domestic private leased land lines and leased international business service circuits to Japan. [3] The existing network provides intracompany communications for digitalized voice and high-speed data and facsimile transmissions between offices. In the present application, Nissan seeks to add Nissan Mexicana, located in Mexico City, Mexico, to the network. Nissan's proposed facility will have no major environmental impact.

14. *Toyota Motor Sales, U. S. A. Inc. (Toyota) (File No. CSG - 90 - 078 (3) - ML).* Toyota seeks authority to modify the licenses of its network for up to 2700 fixed 1.8 and 300 2.4-meter VSAT Ku-band transmit/receive earth stations (Call Signs E890089 and E890090, File Nos. 277-DSE-P/L-89 and 278-DSE-P/L-89) and a 6.1-meter hub at Torrance, California (Call Sign E890088, File No. 276-DSE-P/L-89) for the provision of services between the United States and various countries via all U.S. domestic satellites and the Anik and Morelos satellite systems which have completed consultations under Article XIV(d) of the INTELSAT Agreement. Toyota states that it intends to use these channels of communication for the transmission of data, voice, audio and video communications to Canada, Mexico, Central America and the Caribbean, on a non-common carrier basis. Toyota also requests authority to receive such communications from Canada and Mexico by communicating with all satellite systems which have been, or will be, consulted under Article XIV(d) of the INTELSAT Agreement. There are no technical modifications to the subject earth stations.

15. *Eastman Kodak Communications, Inc (Kodak) (File No. CSG - 90 - 079 - P / L).* Kodak seeks authority to construct and operate a 3.5-meter Ku-band transmit/receive earth station at Dallas, Texas for the provision of services between the United States and Guadalajara, Mexico via the Morelos II satellite. Kodak states that the earth station will be used to transmit and receive two-way, non-switched voice and data communications pertaining to its business and will not communicate with other U.S. sites. The earth station will have no significant environmental impact.

16. *Contel Federal Systems, Inc. (CFS) (File No. CSG - 90 - 082 - ML).* CFS seeks authority to modify the license for its 9.1-meter C-band earth station located at West Palm Beach, Florida (Call Sign E900486, File No. 1372-DSE-P/L-90) to provide service to the National Communications System as part of its Communications Satcom Interconnectivity (CSI) program. CFS states that this earth station will communicate with other earth stations in the CSI network, such as San Ysidro, New Mexico. These stations will provide bypass communications services in the event of a national emergency. In the instant application, CFS proposes to use the subject earth station to provide transborder services over U.S. domestic satellites to countries that have been or will be consulted under Article XIV(d) of the INTELSAT Agreement. In addition, CFS proposed to communicate with the PAS system to provide those services that the Commission has authorized PAS to provide to those countries PAS is authorized to serve. The technical modifications shall be consistent with CFS's application.

17. *Hamilton Communications Consultants, Inc. (Hamilton) (File No. CSG - 90 - 093 - ML).* Hamilton seeks authority to modify the license for its 9.2-meter Ku-band transmit/receive earth station at Orange, New Jersey (Call Sign E860008, File No. 1001-DSE-MP/L-87) to communicate with the PAS-1 satellite to provide television service between the U.S. and those countries which PAS is authorized to serve. The technical modifications shall be consistent with Hamilton's application.

DISCUSSION

18. In 1981, following consultations with the Department of State, the Commission established its Transborder policy which permits the use of U.S. domestic satellites for the transmission of certain public international telecommunications services to points within the footprint of those satellites. Under this policy, domestic satellites may be used for these services where INTELSAT is incapable of providing the service or where it would be clearly uneconomical or impractical to use the INTELSAT system for the service. The Transborder policy also set forth procedures for final implementation of these services. Pursuant to these procedures, consultations under Article XIV(d) of the INTELSAT Agreement have been completed for transborder services between the United States and Canada, the United States and Mexico, and from the United States to Latin American/Caribbean locations.[4]

19. The subject applications request authority to provide services similar to those previously authorized under the Commission's Transborder policy and consulted under Article XIV(d) of the INTELSAT Agreement. For the most part, the applications involve the modification of domestic earth station licenses to extend existing or planned domestic networks to provide business and video services between the United States and Canada and Mexico using U.S. domestic satellites, as well as the Anik and Morelos satellites. Specifically, the majority of these applications involve the provision of intracorporate business communications between geographically dispersed offices.

20. Under these circumstances, we conclude that a grant of the subject applications involving transborder services is consistent with the Commission's Transborder policy and consultations completed under Article XIV(d) of the INTELSAT Agreement. The Commission has previously recognized that where the extension of existing domestic business networks is involved, use of the INTELSAT system would be both clearly impractical and uneconomical.[5] Specifically, the Commission has noted that maximum efficiency is gained through use of one satellite to link a customer's numerous business locations simultaneously. Use of the INTELSAT system would require the virtual duplication of a domestic network for each customer that wanted to add Canadian or Mexican business locations to its network.[6]

21. The same considerations also apply to the distribution of video services where the programming is already being transmitted throughout the United States and can be received in transborder locations on an incidental basis with the addition of small, receive-only earth stations for little or no additional cost.[7] The incidental reception of this programming in transborder locations is consistent with the Commission's Transborder policy and existing INTELSAT consultations. In addition, the Commission has found that use of INTELSAT facilities in such circumstances would be an inefficient use of the available radio frequency spectrum. With respect to point-to-point communications between the U.S. and Canada, the Commission has recognized that these services traditionally have been provided by well-developed terrestrial networks and not by INTELSAT.

22. We also note that the applications of GTE, Transport, and Toyota request authority to communicate with the Anik satellite system which includes the Anik E-A and E-B satellites. Although the Anik E-A and E-B satellites have been consulted pursuant to Article XIV(d) of the INTELSAT Agreement, the U.S. Government has had under discussion with Canada the potential use of these satellites as well as the conditions that may be imposed on U.S. carriers/operators seeking to use them. Therefore, this order does not grant final authority for any of the applicants herein to use these satellites. Final authority will be granted only after the applicants have filed with the Commission copies of operating agreements that would govern the use of these satellites and the Commission determines that such agreements are in the public interest and consistent with the Transborder policy.

23. Further, we find that the applications of Auburn (File Nos. CSG-90-045-ML and CSG-90-050-ML), Group W (File No. CSG-90-059-ML), CFS (File No. CSG-90-082-ML), and Hamilton (File No. CSG-90-093-ML), which propose to access the PAS separate satellite system, are consistent with the Commission's *Separate Systems* decision. On several occasions the Commission has authorized PAS to operate its facilities for communications between the U.S. and specified countries once it was determined that U.S. obligations under Article XIV(d) of the INTELSAT Agreement had been fulfilled.[8] The instant applications seek authority to access the PAS system to provide services to those countries which PAS is authorized to serve subject to the conditions placed on the use of separate satellite systems.

24. Accordingly, IT IS ORDERED that the applications of EUC (File No. CSG-89-170-ML), Sat-Networks (File No. CSG-90-006-P/L), GTE (File No. CSG-90-028(4)-ML), Transport (File No. CSG-90-053(3)-ML), ASC (File Nos. CSG-90-056-ML, CSG-90-057-ML, CSG-90-064-ML and CSG-90-091-ML), Amoco (File No. CSG-90-067-ML), Circuit City (File No. CSG-90-076(3)-ML), Nissan (File No. CSG-90-077-P/L, Toyota (File No. CSG-90-078(3)-ML, Kodak (File No. CSG-90-079-P/L) and CFS (File No. CSG-90-082-ML) ARE GRANTED and the applicants are

authorized to modify the licenses for their existing earth station facilities, construct new earth station facilities and/or provide the transborder services requested in their applications consistent with Attachments 1 and 2. However, as noted in paragraph 22, *supra*, no final authority is granted herein to communicate with the Anik E-A and E-B satellites. *See* Section 308(c) of the Communications Act.

25. IT IS FURTHER ORDERED that Nissan's, Kodak's, and Toyota's operations are limited to the provision of private, intra-company communications only.

26. IT IS FURTHER ORDERED that the modification of licenses for U.S.-based VSAT networks to access the Anik and Morelos satellite systems does not permit the use of these systems to provide purely U.S. domestic service.

27. IT IS FURTHER ORDERED that the applications of Auburn (File Nos. CSG-90-045-ML and CSG-90-050-ML), Group W (File No. CSG-90-059-ML) CFS (File No. CSG-90-082-ML), and Hamilton (File No. CSG-90-093-ML) ARE GRANTED and the existing earth station licenses of Auburn, Group W, CFS, and Hamilton ARE HEREBY MODIFIED to add the PAS-1 satellite as a point of communication for service between the United States and those countries that PAS is now or in the future may be authorized to serve.[9]

28. IT IS FURTHER ORDERED that Auburn, Group W, CFS and Hamilton are restricted in their operation of the subject earth stations communicating with the PAS-1 satellite to the provision of capacity through the sale or long-term lease (of at least one year) of transponder capacity for communications not interconnected with the public-switched message networks (except for emergency restoration service).

29. IT IS FURTHER ORDERED that the authorizations of Auburn, Group W, CFS and Hamilton are subject to Commission jurisdiction over the use of all space segment within the PAS system and operation of the proposed earth stations to ensure compliance with the restrictions place on the operation of separate systems.

30. IT IS FURTHER ORDERED that Auburn, Group W, CFS and Hamilton are restricted to operation of the proposed earth station in accordance with the parameters summarized and conditions described in Attachment No. 1 to AP-11-10E, "Report by the Board of Governors to the Eleventh Assembly of Parties Pursuant to Article XIV(d) on the PanAmSat Network" (February 1987).

31. IT IS FURTHER ORDERED that as further conditions to these authorizations, the relevant earth stations shall comply with the technical parameters in the Commission's orders concerning Domestic services entitled *Routine Licensing of Earth Stations in the 6 GHz and 14 GHz Bands Using Antennas Less than 9 Meters and 5 Meters in Diameter, Respectively, for Both Full Transponder and Narrowband Transmissions*.

32. IT IS FURTHER ORDERED that before completion of equipment installation and facility activation, all applicants for new earth stations specified herein shall provide the Commission with a summary of equipment which was actually installed. The term of construction is one year from the adoption date of this order.

33. This authorization constitutes the final step with respect to the provision of transborder services only insofar as the U.S. regulatory process is concerned. It does not, however, dispense with any requirements that may be imposed by other countries involved.

34. This order shall not be construed as authorizing the distribution of programming where the appropriate copyright clearances have not been obtained.

35. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International
Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] On June 28, 1990, Cylix and EUC filed an application for consent to the *pro forma* assignment of Cylix's Memphis earth station authorizations to EUC. Consent for the assignment of these authorizations was granted on July 13, 1990 (domestic) and July 25, 1990 (international).

[2] These satellites include U.S. domestic satellites and the Anik and Morelos satellite systems.

[3] Nissan states that although a Japanese corporation owns all of its outstanding stock, the instant application does not violate the alien ownership restrictions of Section 310(b) of the Communications Act of 1934, since the satellite earth facility will be operated on a non-common carrier basis for private, intra-company purposes.

[4] *See* Attachments 1 and 2.

[5] Satellite Business Systems, 88 FCC 2d 195 (1981).

[6] We note that many of the applications proposing to extend VSAT networks also seek to provide service to Latin American/Caribbean locations. Any service provided via these networks to Latin American/Caribbean locations is limited to the provision of one-way, receive-only audio, video and data services consistent with existing consultations under Article XIV(d) of the INTELSAT Agreement.

[7] Transborder Satellite Video Services, 88 FCC 2d 258 (1981). The same considerations are applicable where Canadian and Mexican domestic video services are received in the U.S.

[8] *See* Alpha Lyracom, d/b/a Pan American Satellite, 4 FCC Rcd 8649 (1989). PAS-1 is authorized to provide service via its Ku-band capacity between the United States and the Bahamas, Denmark, Federal Republic of Germany, France, Ireland, Italy, Luxembourg, Monaco, the Netherlands, Portugal, Sweden, and the United Kingdom. PAS-1 is authorized to provide service via its C-band capacity between the United States and Argentina, Bahamas, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, Guatemala, Honduras, and Peru.

[9] Only Auburn in its application File No. CSG-90-050-ML and CFS in its application File No. CSG-90-082-ML request authority to use PAS-1's C-band capacity.

ATTACHMENT 1

U.S. Satellites Consulted Pursuant to Article XIV(d)

Satellites

AURORA (SATCOM V)
COMSTAR D-4
CONTEL ASC-I
CONTEL ASC-II
GALAXY I
GALAXY II
GALAXY III
GALAXY IV-R
GALAXY V-R
GALAXY VI (WESTAR VI-S)
GSTAR I
GSTAR II
GSTAR III
SATCOM IR
SATCOM IIR
SATCOM IIIR
SATCOM IV
SATCOM V
SATCOM K-1
SATCOM K-2
SBS I
SBS II
SBS III
SBS IV
SBS V
SBS VI
SPACENET I
SPACENET II
SPACENET III
TELSTAR 301 (TELSTAR 3A)
TELSTAR 302
TELSTAR 303
WESTAR IV
WESTAR V

ATTACHMENT 2

SUMMARY OF INTELSAT CONSULTATIONS

Country	Service[s]	Satellite[s]
Anguilla	T.V., audio and data receive-only	all satellites listed in Attachment 1
Bahamas	T.V., audio and data receive-only	all satellites listed in Attachment 1
Barbados	T.V. receive-only	all Galaxy, Satcom and Westar satellites listed in Attachment 1
Bermuda	T.V., audio and data receive-only	all satellites listed in Attachment 1
British Virgin Islands	T.V., audio and data receive-only	all satellites listed in Attachment 1
Canada	occasional pt.-to-pt. and full time video services and business services (including data and electronic document distribution, video teleconferencing and voice communications)	all satellites listed in Attachment 1 plus Anik C1, C2, C3, D1, D2, E-A and E-B (see note 5)
Cayman Islands	T.V., audio and data receive-only	all satellites listed in Attachment 1
Mexico	Full-time and occasional T.V. services, receive-only audio and business services (including data and electronic document distribution, video teleconferencing and voice communications)	all satellites listed in Attachment 1 plus the Morelos I and II satellites
Monsterrat	T.V., audio and data receive-only	all satellites listed in Attachment 1
Netherlands Antilles	T.V. receive-only	Galaxy I, Satcom III-R and IV, Westar IV and V and Comstar D4

Turks & Caicos	T.V., audio and data receive-only	all satellites listed in Attachment 1
Venezuela	T.V. receive-only	all satellites listed in Attachment 1

Notes

1) All services authorized to Latin American/Caribbean locations are receive-only (i.e. can be received as a by-product of or incidental to U.S. domestic transmissions). All services (i.e. T.V., audio and data receive-only) can be provided to any Latin American/Caribbean point over any of the satellites listed in Attachment 1 even though only certain services and satellites were initially requested. This can be accomplished through notifying INTELSAT with no additional consultation required.

2) Attachment 1 contains only those satellites that have been technically consulted with INTELSAT.

3) Attachment 2 does not contain all of the Latin American/Caribbean countries which have been included in previous charts. Attachment 2 contains only those countries that associated with the most recent INTELSAT Article XIV(d) consultation in October 1989 (AP-15-23E). Other countries will be added to the list once they associate with that consultation.

4) No final authority will be granted for the use of the Anik E-A and E-B satellites until an applicant submits an operating agreement and the Commission determines that the agreement is in the public interest and consistent with the Commission's Transborder Policy.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

SATELLITE TRANSMISSION & RECEPTION SPECIALIST CO. File No. I-T-C-90-151

Application for authority to operate as an international resale carrier.

BUSINESS COMMUNICATIONS NETWORK, INC File No. I-T-C-90-154

Application for authority to operate as an international resale carrier.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: November 2, 1990; Released: November 13, 1990

By the Chief, International Facilities Division:

1. The above-captioned applications filed on July 17, and 13, 1990, respectively, by Satellite Transmission & Reception Specialist Co. (STARS) and Business Communications Network, Inc. (BCN), request authority pursuant to Section 214 of the Communications Act of 1934, as amended, to resell the switched message telephone services of existing common carriers to provide international switched voice service between the U.S. and various overseas points. The applications were placed on public notice on July 25, 1990. No comments were received.

2. STARS is a common carrier which provides international television service and INTELSAT Business Service. BCN is a domestic resale carrier. They now propose to resell international switched voice services in competition with other common carriers already providing resale of such services. In authorizations of new entrants over the past decade, the Commission has recognized that increased competition in international markets is beneficial.[1] We find that the market will support additional carriers and that the added competition will be in the public interest.[2]

3. For the foregoing reasons, IT IS CERTIFIED that the present and future public convenience and necessity require the provision of international switched voice services to the general public by STARS and BCN.

4. Accordingly, IT IS ORDERED that applications File Nos. I-T-C-90-151 and I-T-C-90-154 ARE GRANTED; and

a. STARS is authorized to provide international switched voice services by the resale of the international switched voice services set forth in AT&T's Tariff F.C.C. No. 1, MCI's Tariff F.C.C. No. 1 and US Sprint's Tariffs F.C.C. Nos. 1 and 2 between the U.S. and the points listed in those tariffs; and

b. BCN is authorized to provide international switched voice services by the resale of the international switched voice services set forth in MCI's Tariff F.C.C. No. 1 between the U.S. and the points listed in that tariff.

5. Copies of any operating agreements entered into between the applicants and their correspondents shall be filed with the Commission within 30 days of their execution.

6. IT IS FURTHER ORDERED that the applicants shall file tariffs pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicants shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTES

[1] *See, e.g.*, the cases cited in the Teltec Saving Communications Co., File No. I-T-C-86-062, Mimeo No. 3548, (released April 4, 1986) at n.2.

[2] FCC v. RCA Communications, Inc., 346 U.S. 86 (1953); Mackay Radio and Telegraph Co., 28 FCC 231 (1960).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

UPS TELECOMMUNICATIONS, INC. File No. I-T-C-90-146

Application for authority to establish channels of communications between international earth stations in the U.S. and INTELSAT satellites for the provision of INTELSAT Business Services.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: November 2, 1990; Released: November 13, 1990

By the Chief, International Facilities Division:

1. The above-captioned application filed on July 11, 1990 and amended on October 25, 1990 by UPS Telecommunications, Inc. (UPS Telecom) requests authority, pursuant to Section 214 of the Communications Act of 1934, as amended, to establish channels of communication between international earth stations in the U.S. and INTELSAT satellites for the provision of INTELSAT Business Services (IBS) to United Parcel Service of America, Inc. (UPS) and to the general public from the U.S. to various international points. UPS Telecom, a Delaware Corporation, is a wholly-owned subsidiary of UPS. UPS Telecom states that it plans to acquire satellite capacity from Comsat and use its own earth stations. Applications for such earth stations will be filed separately pursuant to Title III of the Communications Act. The application was placed on public notice on July 18, 1990. No comments were received. Upon consideration of the application, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of IBS service by UPS Telecom.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-90-146 IS GRANTED, and UPS Telecom is authorized to lease from Comsat and operate channels of communications between international earth stations in the U.S. which are or may be licensed for IBS and INTELSAT satellites for the provision of IBS and related digital video services between the U.S. and those countries which are or hereafter will be listed in Comsat's tariff provisions for the space segment component of IBS or related digital video services. Provided, however, this authorization is without commitment as to the Commission's action on any IBS earth station Title III application that UPS Telecom may file in the future.

3. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

4. No material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between UPS Telecom and its correspondents and copies of the agreements shall be filed with the Commission within 30 days of their execution.

5. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

6. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61 (October 1, 1989).

7. IT IS FURTHER ORDERED that the appliant shall file semi-annual circuit reports pursuant to Section 63.10(b) of the Commission's Rules, 47 C.F.R. Section 63.10(b) (October 1, 1989).

8. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-499

In the Matter of

Amendment of Part 74 to Permit the Use of F3Y Emission for Encrypting Communications of Remote Pickup Broadcast Stations

NOTICE OF PROPOSED RULE MAKING

Adopted: October 16, 1990; Released: November 15, 1990

By the Commission:

INTRODUCTION

1. The Commission proposes to amend Subpart D of Part 74 of its Rules to provide for the use of digital voice ("F3Y")[1] emission for encrypting aural communications of remote pickup broadcast stations.[2] Stations that digitally encrypt communications relating to fast-breaking news events could prevent such information from being intercepted by unauthorized third parties able to monitor the stations' frequencies. This has the potential for extending the time a station has exclusive use of a news story.

2. This action is prompted by the Commission's receipt of several applications to use F3Y emission in the Remote Pickup Broadcast Service. [3] While the demand for this technology currently is low, it could increase substantially. Because the use of F3Y emissions has been authorized in the private land mobile services for many years without technical or operational problems and because spectrum usage patterns in the private land mobile services and the remote pickup broadcast service are similar, its authorization under Part 74 is not expected to have any adverse impact.

BACKGROUND

3. Encryption is the arrangement of information in a predetermined pattern or code known only to the sender and the receiver. Its purpose is to prevent unauthorized interception of secret information. So-called "analog scrambling," which involves some form of audio frequency inversion, masking or band-splitting, has been treated as a matter of policy as a normally authorized voice emission in both the remote pickup and private land mobile services for decades, although the extent of its use in the remote pickup service is unknown. However, analog scrambling methods generally rely upon a limited number of encoding schemes which, while they may be generally successful in preventing interception, simply do not afford the privacy that more recently developed digital methods offer.

4. Digital methods of encrypting communications were developed for the military during the late sixties and early seventies and were introduced to the private land mobile community in 1977 in Docket 21142.[4] Initially, only Police and Fire Radio Service licensees were permitted use of F3Y emission because only these services had sought authority to digitally encrypt their communications. Subsequently, licensees in the remaining two-way land mobile services were permitted to use F3Y emissions on the channels available to them for analog voice communications. Although there was initially some concern that interference might arise between digital and non-digital users, this has not proven to be the case. The land mobile rules require that digital emissions be identified at regular time intervals using the regular non-scrambled analog voice emission, thus enabling all channel occupants to know who is using the channel. This facilitates the shared use of the channel by reducing the potential for unidentifiable interference. To facilitate Commission enforcement efforts, all authorizations for digital voice operations in the land mobile services require that the licensee disclose to the agency upon request a complete description of the particular digital encoding scheme being used.

PROPOSAL

5. The Commission now proposes to amend §74.462 and §74.482 of its rules to permit the use of digitized voice modulation for communications by broadcast remote-pickup stations. This would be done by adding the F3Y emission designator to the list of permissible emissions and adopting a requirement that identification of such stations be made using non-digital emissions.[5]

6. Digital modulation presents a unique opportunity for licensees to scramble their communications in such a fashion that they are totally unintelligible to anyone listening on the channel. Thus, there would be no way for an unauthorized party to monitor communications and make use of the material overheard. Once a signal is digitized and the separate bits of data are scrambled, it cannot be 'reassembled' at the receiver unless the exact digitizing scheme used at the transmitter is also used at the receiver. For this reason, it is impossible for a non-compatible digital receiver, or an analog receiver, to demodulate an encrypted digital signal successfully. To an analog receiver listening on a digital channel, the digital transmission can sound like an increase in normal channel background noise. This makes it essential that all users on a channel, including digital users, identify their transmissions in such a way that everyone is made aware of their presence. Our proposal to require non-scrambled analog station identification should fully meet this need, as it has for a number of years in the land mobile services. We wish in no way to penalize those licensees who choose to use analog modulation by subjecting them to harmful interference from digital users, but we do not believe that analog users should operate without regard for the presence of digital signals because those signals may seem to be mere noise.

7. With respect to technical compatibility, we note that the F3Y emission produces a signal waveform which differs considerably from its analog counterpart. This issue was explored in great detail in Docket 21142 and again in PR Docket 80-416, which expanded the use of digital voice modulation in the private radio services.[6] The primary focus of the Rule Makings was to determine what

limits ought to be applied to the shape of the digital wave-form to minimize adjacent channel interference without unnecessarily restricting the design flexibility and usefulness of the digital transmitter. New emission limitations were developed for this purpose and made a part of the land mobile rules (*see* 47 C.F.R.§90.209(f)-(i)). Because these limitations have worked well for several years, we propose to incorporate them in §74.462 of our rules.

8. We recognize that a balance must be struck between bit rate, which determines the quality of the demodulated audio signal, and its occupied bandwidth, which affects the amount of adjacent channel interference caused to other nearby users. The balance struck for the land mobile services has meant that the fidelity of currently available F3Y transmitters is of moderate quality. In an environment where many users are competing for a limited number of channels, we do not believe that the land mobile digital emissions standards we propose to adopt for use in the Remote Pickup Broadcast Service should be made less stringent to provide for higher fidelity communications. Any expansion in digital bandwith is likely to make the station's operation incompatible with currently assignable channel bandwiths and result in adjacent channel interference. We invite comment on our proposal to permit licensees in the Broadcast Remote Pickup Service to use F3Y emissions, subject to the conditions and limitations now imposed on the use of such emissions in the land mobile services. In particular, we seek comment and suggestions on limitations that might be needed to reduce adjacent channel interference.

ADMINISTRATIVE MATTERS

9. Authority for the proposed rule changes is contained in Sections 4(i), 5(c)(1), 302 and 303 of the Communications Act of 1934, as amended.

10. Under procedures set out in Section 1.415 of the Commission's Rules and Regulations, interested parties may file comments on or before **January 4, 1991** and reply comments on or before **January 22, 1991.** Extensions of these time periods are not contemplated. All relevant and timely comments will be considered by the Commission before final action is taken. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact that the Commission's reliance on such information is noted in the Report and Order.

11. In accordance with the provisions of Section 1.419 of the Rules and Regulations, formal participants shall file an original and 5 copies of their comments and other materials. Participants wishing each Commissioner to have a personal copy of their comments should file an original and 10 copies. Members of the general public who wish to express their views are given the same consideration, regardless of the number of copies submitted. All documents will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters in Washington D.C.

12. The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and have been found to contain no new or modified record keeping requirements.

13. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex - parte* presentations are permitted except during the Sunshine Agenda period. *See* generally Section 1.1206(a) of the Commission's Rules. The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission: (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. During the Sunshine Agenda period, no presentation, *ex - parte* or otherwise, is permitted unless specifically requested by the Commission or staff for clarification or adduction of evidence, or the resolution of issues in the proceeding (see Section 1.1203).

14. In general, an *ex - parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which: (1) if written, is not served on the parties to the proceeding, or (2) if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. *See* Section 1.1202(b) of the Commission's Rules. Any person who submits a written *ex - parte* presentation must provide on the same day it is submitted, a copy of same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex - parte* presentation that presents data or arguments not already reflected in that person's previously filed written comments, memoranda or filings in the proceeding, must provide on the day of the oral presentation, a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and statements. Each *ex - parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates (see Section 1.1206).

15. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an initial regulatory flexibility analysis (IRFA) of the expected impact on small entities of the proposals advanced herein (see Appendix B). Written public comments are requested on the IFRA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of the *Notice*, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel of the Advocacy of the Small Business Administration, as required by Section 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.*, (1981)).

16. Further information on this matter may be obtained from Joseph M. Johnson, Mass Media Bureau, Engineering Policy Branch, (202) 632-9660.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

It is proposed to amend 47 CFR Part 74 as follows:

1. The authority citation for Part 74 would continue to read as follows:

Authority: Secs 4, 303, 48 Stat. 1066, as amended, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply secs. 301, 303, 307, 48 Stat. 1081, 1082, as amended, 1083, as amended; 47 U.S.C. 301, 303, 307.

Frequencies (megahertz)	Authorized bandwidth (kilohertz)	Maximum frequency deviation (kilohertz)	Type of emission
25.87 to 26.03	40	10	A3, F3, F3Y, F9
26.07 to 26.47	20	5	A3, F3, F3Y, F9
152.87 to 153.35	30/60	5/10	A3, F3, F3Y, F9
160.89 to 161.37	60	10	A1,A2,A3,F1,F2,F3,F3Y,F9
161.64 to 161.76	30	5	A1,A2,A3,F1,F2,F3,F3Y,F9
166.25 to 170.15	25	5	A1,A2,A3,F1,F2,F3,F3Y,F9
450.01 to 455.99 (10 khz ch.)	10	1.5	A1,A2,A3,F1,F2,F3,F3Y,F9
450.0875 to 455.6125 (25 khz ch.)	25	5	A1,A2,A3,F1,F2,F3,F3Y,F9
450.05 to 455.85 (50 khz ch.)	50	10	A1,A2,A3,F1,F2,F3,F3Y,F9
450.925 and 455.925 (100 khz ch.)	100	35	A1,A2,A3,F1,F2,F3,F3Y,F9

2. It is proposed that Section 74.462 be amended by adding the emission F3Y to the table of emissions in paragraph (b), and by adding new paragraphs (f) and (g) to read as follows:

* * * * *

* * * * *

(f) For those transmitters using the F3Y emission and operating in the frequency range between 25.87 MHz and 170.15 MHz, the power of any emission shall be attenuated below the unmodulated carrier power (P) in accordance with the following schedule:

(1) On any frequency removed from the center of the authorized bandwidth by a displacement frequency (Fd in kHz) of more than 5 kHz, up to and including 10 kHz: At least 83 Log (Fd/5) decibels;

(2) On any frequency removed from the center of the authorized bandwidth by a displacement frequency (Fd in kHz) of more than 10 kHz, up to and including 250 percent of the authorized bandwidth: At least 29 Log (Fd)exp2/11) decibels or 50 decibels, whichever is the lesser attenuation.

(3) On any frequency removed from the center of the authorized bandwidth by more than 250 percent of the authorized bandwidth: At least 43 plus 10 Log (output power in watts) decibels or 80 decibels, whichever is the lesser attenuation.

(g) For those transmitters using the F3Y emission and operating in the frequency range between 450.01 MHz and 455.925 MHz, the power of any emission shall be attenuated below the unmodulated carrier power (P) in accordance with the following schedule:

(1) On any frequency removed from the center of the authorized bandwidth by a displacement frequency (Fd in kHz) of more than 5 kHz, up to and including 10 kHz: At least 83 Log (Fd/5) decibels;

(2) On any frequency removed from the center of the authorized bandwidth by a displacement frequency (Fd in kHz) of more than 10 kHz, up to and including 250 percent of the authorized bandwidth: At least 116 Log (Fd/6.1) decibels or 70 decibels, whichever is the lesser attenuation.

(3) On any frequency removed from the center of the authorized bandwidth by more than 250 percent of the authorized bandwidth: At least 43 Log (output power in watts) decibels or 80 decibels, whichever is the lesser attenuation.

Note: The measurements of emission power can be expressed in peak or average values provided they are expressed in the same parameters as the unmodulated transmitter carrier power.

3. It is proposed that section 74.482 be amended by adding a new paragraph (e) to read as follows:

74.482 Station identification

* * * * *

(e) For stations using the F3Y emission, identification shall be transmitted in the unscrambled analog (F3) mode or in International Morse Code pursuant to the provisions of (d), above. For purposes of rule enforcement, all licensees using F3Y emissions shall provide, upon request by the Commission, a full and complete description of the encoding methodology currently in use.

APPENDIX B

Initial Regulatory Flexibility Act Analysis

I. Reason for Action

The proposed action is necessary in order to permit Part 74 licensees to utilize the digitized voice (F3Y) emission.

II. Objectives

The objective is to give licensees in the Broadcast Remote Pickup Service more flexibility and choice in how they transmit confidential information and other material that they do not wish disseminated without their control and/or approval.

III. Legal Basis

The action proposed by this *Notice* is authorized by Sections 4(i), 302 and 303 of the Communications Act of 1934, as amended.

IV. Description, Potential Impact and Number of Small Entities Affected

The action proposed would affect the Remote Pickup licensees under Part 74 who chose to use the F3Y emission. The impact would be beneficial, in that licensees would be permitted more latitude in the operation of their stations. The potential number of licensees who might wish to take advantage of the rule relaxation is not known.

V. Recording, Record Keeping and Other Compliance Requirements

None

VI. Federal Rules which Overlap, Duplicate or Conflict with this Rule

None

VII. Any Significant Alternative Minimizing Impact on Small Entities and Consistent with the stated Objectives

None

FOOTNOTES

[1] Strictly speaking, the designator F3Y has been supplanted by the more recently developed ITU designators F1E and G1E, representing, respectively, frequency modulated and phase modulated single-channel digital telephony. For the sake of convenience, F3Y will be used in this proceeding to refer to the F1E and G1E emissions.

[2] Channels for remote pickup operations are in the 25, 150 and 450 MHz frequency bands. Channels are assigned on a shared, nonexclusive basis. A license for a remote pickup station may be issued to the licensee of an AM, FM, noncommercial FM, TV, international broadcast or low power TV station, a broadcast network entity or cable network entity.

[3] On July 13, 1990, the staff granted waivers to permit the use of F3Y emission by Jefferson Pilot Communications Company, licensee of station WBTV, Charlotte, North Carolina and by WSOC Television Inc., licensee of station WSOC, Charlotte, North Carolina.

[4] *See First Report and Order* in Docket No. 21142, 42 RR2d 355 (1978), and *Second Report and Order* in Docket No. 21142, 46 RR2d 937 (1979).

[5] We propose to use the designator F3Y in Part 74 until Part 74 is revised to make all Part 74 emission designators conform with current ITU specifications.

[6] *See First Report and Order* in PR Docket No. 80-416, 86 FCC 2d 405 (1981), and *Second Report and Order*, in PR Docket No. 80-416, 51 RR2d 210 (1982).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-500

In the matter of

Definition of Congested Areas in
the Broadcast Auxiliary Services and
the Cable Television Relay Service.

NOTICE OF PROPOSED RULE MAKING

Adopted: October 16, 1990; Released: November 14, 1990

By the Commission:

INTRODUCTION

1. The Commission has before it a petition for rule making (petition) submitted by the Society of Broadcast Engineers (SBE) requesting that Part 74 of the Rules be amended to define precisely those geographical areas that are considered "subject to frequency congestion."[1] This definition is necessary to supplement rules that require all fixed auxiliary and cable television relay stations to employ antennas meeting minimum standards after October 1, 1991.[2] In this *Notice* we grant SBE's petition to initiate a Rule Making and propose a definition of congested areas that addresses SBE's concern, as well as similar issues related to Part 78 of our Rules.

BACKGROUND

2. The Commission first adopted minimum antenna standards only for broadcast auxiliary and cable television relay service stations operating in the 13 GHz band. [3] In subsequent rule makings, the broadcast auxiliary and cable television relay service standards were extended to such stations operating in the 2, 7, 18, and 31 GHz bands.[4] These rules now require that all new point-to-point fixed link broadcast auxiliary or cable television relay service stations employ directional transmitting antennas with radiation patterns that meet or exceed that of the "Category B" performance level. Further, such stations operating in areas subject to frequency congestion are required to employ more efficient antennas that meet or exceed the "Category A" performance level. The Category A standards require that the transmitted signal be focused into a more narrow beam than the Category B standards and thus further reduce the potential for interference by confining the signal to a smaller area.[5]

3. The antenna standards rules provided a 10 year "grandfathering" period during which then-existing Part 74 and Part 78 stations would be permitted to continue use of previously installed antennas until October 1, 1991. After that date, all Part 74 and Part 78 fixed stations must meet the applicable category transmitter antenna requirements. When the original rules were adopted, we stated that we would develop criteria to designate areas subject to frequency congestion in a subsequent rule making. In this *Notice*, we undertake that task.

DISCUSSION

4. As growth in the broadcast auxiliary and other Part 74 and Part 78 microwave services continues, areas not initially considered congested may eventually become so and require the use of more spectrum efficient transmitting equipment. Conversely, stations in the many other areas where congestion is not a problem could be permitted to operate under more relaxed standards. Thus, the method for designating congested areas must recognize the level of spectrum usage, be concise and easily understood, provide for timely and universal publication of revisions, and be easily accessible to interested parties.

5. The SBE petition notes that the concentration of stations serving a particular area (i.e., the level of frequency congestion) is usually directly related to the population of that area and that areas considered to be frequency congested therefore tend to occur in Metropolitan Statistical Areas (MSAs). MSAs are determined by the Department of Commerce and are based upon the information acquired by the U.S. Census. We believe that determining whether a radio link is located within an MSA is a reasonable method of deciding whether or not it is in a congested area. Such an approach appears to meet the requirements of clarity and ease of use. MSAs are precisely defined and easily understood by both technical and non-technical personnel. Equally important, MSA information enjoys wide distribution, is used for many different purposes, and is periodically updated. This attribute is very attractive because it does not require expenditure of any additional resources on the part of the Commission or the industry to implement and it would automatically adjust to include new areas of congestion as they develop.

6. SBE recognizes that for the New England States, MSAs are composed of New England County Metropolitan Areas (NECMAs). However, these areas closely correspond to county boundaries and the MSAs for the majority of the United States are based upon county boundaries. Therefore, SBE suggests that for administrative convenience, county boundaries in the New England States likewise be used to determine congested areas. Accordingly, reference within the remainder of this document to MSAs encompasses both MSAs and county boundaries corresponding to NECMAs.

7. SBE also notes that in some instances, common transmitter sites located on mountain tops, for example, although not located within MSAs, could also require a higher level of spectrum efficiency to permit many systems to co-exist. This situation, however, is not expected to occur often and could be addressed on a case by case basis. We note that many such sites are in fact located in MSAs and therefore the number of sites not within MSAs should be small and not require frequent revision.

8. SBE documents its petition with tables and maps depicting where the MSAs are geographically located. It accurately depicts the advantages of adopting this method of defining congested areas. The petition is included in the docket file and indicates where the proposed areas are located relative to broadcast markets.

9. In general, many stations in the major markets are already using Category A antennas out of necessity because of current congestion levels. Therefore, this pro-

posal should not adversely affect the majority of stations that were designed and are operated consistent with "good engineering practice." Furthermore, because spectrum is a limited and valuable resource, we cannot continue to allow inefficient transmission systems in congested areas. We believe that in areas where a majority of stations have already expended resources to make efficient use of the spectrum, we cannot allow a minority of licensees to ignore their obligation to conserve spectrum and to reduce interference.

10. There are numerous MSAs that are subject to congestion (*e.g.*, Los Angeles, New York and other large cities). On the other hand, smaller MSA's may not be experiencing frequency congestion. We are sensitive to this possibility and we do not want to impose any unnecessary burdens in such cases. Thus, while the SBE proposal to include all MSAs appears to be a reasonable initial approach, we invite comment on which, if any, MSAs should be excluded, the basis for such exclusion and criteria which could lead to their future inclusion should circumstances appear to warrant it. We also seek comment on whether and how we might exclude portions of those MSAs which are extraodinarily large and encompass substantial rural areas.

11. Accordingly, we tentatively find SBE's proposal to constitute a reasonable course of action in this matter and therefore we propose a new definition in Sections 74.2 and 78.5, which would designate areas subject to frequency congestion for such stations to include all MSAs. A station would be required to comply with congestion standards if any portion of the link path falls within a designated congested area. Also, existing stations would have a 1 year period to upgrade from the date an area is designated as congested. We note that the 13, 18 and 31 GHz bands are shared with non-broadcast services which have their own standards for determining congestion. We seek comment as to whether the application of different standards in different services will lead to practical difficulties.

12. Further, we propose that the Chief, Mass Media Bureau maintain a list of areas not within MSAs where congestion is considered to be a problem and, if necessary, a list of excluded MSAs. These lists would be revised at the discretion of the Bureau Chief under delegated authority and published in the Federal Register. SBE suggests annual revision of such lists, if necessary. We propose to review the list on an annual basis and use a Public Notice published in the Federal Register to solicit proposed changes that appear appropriate. To establish an initial list of such special areas, we request interested parties to submit descriptions of such areas outside MSAs which they believe deserve consideration, as well as justification for such designation.

13. In the interest of simplifying the administrative process for Part 74 and Part 78 stations upgrading to higher category antennas, we propose to consider such upgrades as a minor modification of the license, provided that the overall height above ground level of the antenna tower structure and the elevation above ground of the antenna's center of radiation remain the same, there are no other major modifications to the license within the 1 year upgrade period, and the local frequency coordinator is advised of the upgrade prior to any change.

ADMINISTRATIVE MATTERS

14. Authority for the proposed rule changes upon which comments are invited is contained in Sections 4(i), 5(c)(1), 302, and 303 of the Communications Act of 1934, as amended, 47 U.S.C. Sections 154(i), 155(c)(1), 302, and 303.

15. Under procedures set out in Section 1.415 of the Commission's Rules and Regulations, 47 CFR §1.415, interested persons may file comments on or before **January 4, 1991** and reply comments on or before **January 22, 1991** All relevant and timely comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision, the Commission may take into consideration information and ideas not contained in the comments, provided that such information or a writing indicating the nature and source of such information is placed in the public file, and provided that the fact of the Commission's reliance on such information is noted in *Report and Order*.

16. In accordance with the provisions of Section 1.419 of the Rules and Regulations, 47 CFR §1.419, formal participants shall file an original and 5 copies of their comments and other materials. Participants wishing each Commissioner to have a personal copy of their comments should file an original and 10 copies. Members of the general public who wish to express their views are given the same consideration, regardless of the number of copies submitted. All documents will be available for public inspection during regular business hours in the Commission's Public Reference Room at its headquarters in Washington, D.C.

17. The proposals contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and have been found to contain no new or modified record keeping requirements.

18. For purposes of this non-restricted notice and comment rule making proceeding, members of the public are advised that *ex parte* presentations are permitted except during the Sunshine Agenda period. *See generally* Section 1.1206(a) of the Commission's Rules. The Sunshine Agenda period is the period of time which commences with the release of a public notice that a matter has been placed on the Sunshine Agenda and terminates when the Commission: (1) releases the text of a decision or order in the matter; (2) issues a public notice stating that the matter has been deleted from the Sunshine Agenda; or, (3) issues a public notice stating that the matter has been returned to the staff for further consideration, whichever occurs first. During the Sunshine Agenda period, no presentation, *ex parte* or otherwise, are permitted unless specifically requested by the Commission or staff for clarification or adduction of evidence, or the resolution of issues in the proceeding (see Section 1.1203).

19. In general, an *ex parte* presentation is any presentation directed to the merits or outcome of the proceeding made to decision-making personnel which: (1) if written, is not served on the parties to the proceeding, or (2), if oral, is made without advance notice to the parties to the proceeding and without opportunity for them to be present. *See* Section 1.1202(b) of the Commission's Rules. Any person who submits a written *ex parte* presentation must provide on the same day it is submitted, a copy of same to the Commission's Secretary for inclusion in the public record. Any person who makes an oral *ex parte* presentation that presents data or arguments not already reflected in that person's previously filed written com-

ments, memoranda or filings in the proceeding, must provide on the day of the oral presentation, a written memorandum to the Secretary (with a copy to the Commissioner or staff member involved) which summarizes the data and statements. Each *ex parte* presentation described above must state on its face that the Secretary has been served, and must also state by docket number the proceeding to which it relates (see Section 1.1206).

20. As required by Section 603 of the Regulatory Flexibility Act, the Commission has prepared an initial regulatory flexibility analysis ("IFRA") of the expected impact on small entities of the proposals advanced herein. Written public comments are requested on the IFRA. These comments must be filed in accordance with the same filing deadlines as comments on the rest of the *Notice*, but they must have a separate and distinct heading designating them as responses to the regulatory flexibility analysis. The Secretary shall cause a copy of the *Notice*, including the initial regulatory flexibility analysis, to be sent to the Chief Counsel for Advocacy of the Small Business Administration, as required by Section 603(a) of the Regulatory Flexibility Act (Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.*, (1981)).

21. Further information on this matter may be obtained from Hank VanDeursen, Mass Media Bureau, Engineering Policy Branch, (202) 632-9660.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

APPENDIX A

It is proposed to amend 47 C.F.R. Part 74 and Part 78 as follows:

1. The authority citation for Part 74 would continue to read as follows:

Authority: Secs. 4, 303, 48 Stat. 1066, as amended, 1082, as amended; 47 U.S.C. 154, 303, unless otherwise noted. Interpret or apply secs. 301, 303, 307, 48 Stat. 1081, 1082, as amended, 1083, as amended; 47 U.S.C. 301, 303, 307.

2. It is proposed to amend Section 74.2 by adding a new definition, in alphabetical order, to read as follows:

§ 74. 2 General definitions.

Area subject to frequency congestion: A geographical area shall be designated as subject to frequency congestion if that area is listed by the Department of Commerce as a Metropolitan Statistical Area (MSA), New England County Metropolitan Area (NECMA), or if it is outside the regular MSAs or NECMAs and is so designated by the Chief, Mass Media Bureau in a Public Notice published in the Federal Register. The Chief, Mass Media Bureau may also designate and maintain a list of excluded counties in MSAs. Stations must conform to the congested area standards within one year after designation, provided that any portion of the link path is within the designated congested area.

* * * * *

3. The authority citation for Part 78 would continue to read as follows:

Authority: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat. 1066, as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085; 47 U.S.C. 152, 153, 154, 301, 303, 307, 308, 309.

4. It is proposed to amend Section 78.5 by redesignating paragraphs (a) through (i) as (b) through (j) and adding a new paragraph (a) to read as follows:

§ 78. 5 Definitions.

* * * * *

(a) *Area subject to frequency congestion*: A geographical area shall be designated as subject to frequency congestion if that area is listed by the Department of Commerce as a Metropolitan Statistical Area (MSA), New England County Metropolitan Area (NECMA), or if it is outside the regular MSAs or NECMAs and is so designated by the Chief, Mass Media Bureau in a Public Notice published in the Federal Register. The Chief, Mass Media Bureau may also designate and maintain a list of excluded counties in MSAs. Stations must conform to the congested area standards within one year after designation, provided that any portion of the link path is within the designated congested area.

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APPENDIX B

Initial Regulatory Flexibility Act Analysis

I. Reason for Action

The proposed action is necessary to define precisely frequency congested areas that are referenced by other rules in the broadcast auxiliary and cable television relay services.

II. Objectives

The objectives of this proceeding are to provide a clear and easily understood definition of geographical areas considered subject to frequency congestion.

III. Legal Basis

The action taken by this *Notice* is authorized by Sections 4(i), 302, and 303 of the Communications Act of 1934, as amended.

IV. Description, Potential Impact and Number of Small Entities Affected

The action proposed in this proceeding would affect only broadcast auxiliary and cable television relay service stations operating in areas considered subject to frequency congestion and only those stations that have not already upgraded their antennas to meet the requirements specified for Category A antennas. The potential number of such stations that are small entities that might be affected is unknown. The cost of upgrading to a Category A antenna can vary widely depending upon the particular antenna selected and the cost of installation (which may be largely dependent upon the height of the antenna above ground). The probable expenditure could vary between several hundred and several thousand dollars.

V. Recording, Record Keeping and Other Compliance Requirements

None.

VI. Federal Rules which Overlap, Duplicate or Conflict with this Rule

None.

VII. Any Significant Alternative Minimizing Impact on Small Entities and Consistent with the Stated Objectives

None.

FOOTNOTES

[1] *See* Petition for Rule Making, *Definition of Congested Areas for Broadcast Auxiliary Purposes*, submitted by the Society of Broadcast Engineers, Inc., filed February 27, 1990, at page 1.

[2] *See* §§74.536, 74.641, and 78.105.

[3] *See Report and Order* in Docket No. 21505, adopted October 21, 1980, FCC 80-604, released November 14, 1980, 82 FCC 2d 354.

[4] *See* General Docket No. 82-334. There were several separate orders in this proceeding, each of which added bands while retaining the language set forth in Docket No. 21505 concerning congested areas.

[5] *See* Section 74.461 for a concise description of the radiation patterns of both Category A and B antennas.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

T-COM, INC.
(Assignor)

and File No. 22893-CD-AL-1-85

AMERICAN PAGING, INC.
(of Connecticut)
(Assignee)

For consent to assign the license for
Public Land Mobile Service Station
KNKC345 in Northford, Connecticut.

In re Application of

T-COM, INC.
(Assignor)

and File No. 22822-CD-AL-1-86

AMERICAN PAGING, INC.
(Assignee)

For consent to assign the licensees
Public Land Mobile Service Stations
KNKD576 in Hartford, Connecticut
and KNKD574 in Springfield,
Massachusetts.

MEMORANDUM OPINION AND ORDER

Adopted: October 23, 1990; Released: November 15, 1990

By the Commission:

1. Henry M. Zachs, d/b/a Massachusetts-Connecticut Mobile Telephone Company ("Zachs") has filed an application for review of a ruling by the Chief, Common Carrier Bureau (Bureau) which authorized the assignment of licenses for Stations KNKC345 Northford, Connecticut, and KNKD574, Springfield, Massachusetts, from T-COM, Inc. (T-COM) to American Paging Inc. (API) and issued to T-Com a Notice of Apparent Liability (NAL) for a $5,000 forfeiture for apparent violations of Sections 22.9 and 22.43 of the Commission's Rules.[1] *Notice of Apparent Liability and Assignment of Licenses*, 3 FCC Rcd 1772 (Com. Car. Bur. 1988) (hereafter "*NAL*").[2] API has filed an opposition to the application for review. For the reasons set forth below, the application for review is denied.

I. BACKGROUND

2. The facts underlying this proceeding as set forth in the Bureau's ruling are largely undisputed. [3] In April 1984, T-COM obtained Commission authorizations to construct Station KNKC345 (Northford, Connecticut) and KNKD574 (Springfield, Massachusetts). Under the terms of the authorizations, construction for the two stations was to have been completed by April 9 and 22, 1985 respectively. On April 5, 1985, T-COM filed notices with the Commission representing that it had completed construction of the two stations. Also on April 5, T-COM entered into an agreement to transfer the licenses for the two stations, as well as the license for Station KNKD576, Hartford, Connecticut, to API. An application for assignment of the Station KNKC345 license was filed on April 11, 1985. An application for assignment of Stations KNKD574 and KNKD576 was subsequently filed on April 3, 1986.[4]

3. On May 28, 1985, Zachs filed a request for investigation with the Commission challenging the bona fides of T-COM's construction notifications. Zachs alleged that neither Station KNKC345 nor KNKD574 was operational at the time T-COM filed the notices because the transmitters for the stations had not been connected to power sources. Zachs also alleged that Station KNKC345 could not be operated at the time due to limitations imposed by the site owner based on potential for harmful interference. As further support for his claim that Station KNKD574 was not "ready for operation" within the meaning of Section 22.43, Zachs claimed that T-COM had not obtained the requisite authorization from the State of Massachusetts to operate the facility. Finally, Zachs alleged that the proposed assignee, API, had already assumed control of the two stations under the guise of a construction and management agreement, raising a question of an unauthorized assignment of license as well as possible lack of candor and/or misrepresentation on the part of T-COM.

4. In an opposition to Zachs' request, filed June 24, 1985, T-COM did not dispute the specific facts alleged by Zachs regarding construction of the two facilities but maintained that it was in full compliance with Commission requirements at the time it filed the construction notifications. T-COM stated that it had interpreted Section 22.43 of the Rules to require that a proposed facility be ready for operation at the time the permittee notifies the Commission of the completion of construction, not that it be in actual operation. T-COM maintained that both Station KNKC345 and KNKD574 met this standard. With regard to the alleged unauthorized assignment of license, T-COM admitted that API had constructed the stations pursuant to a construction and management agreement with T-COM but further stated that T-COM had at all times retained control over the facilities. On July 9, 1985, Zachs filed a reply challenging T-COM's interpretation of Section 22.43 of the Rules. Zachs also urged the Commission to examine the agreement between T-COM and API to determine whether T-COM actually retained control of the stations. Zachs, however, provided no affirmative evidence to support his allegations regarding control.[5]

5. On August 26, 1985, in response to a letter of inquiry from the Bureau's Mobile Services Division, T-COM submitted information which confirmed that neither station was connected to a power source at the time it filed the completion of construction notifications on April 5, 1985, and that state certification had not been

obtained to operate Station KNKD574. The information also confirmed that T-COM had relocated Station KNKC345 without prior Commission authorization and had conducted a service test from the new location on July 13, 1985. T-COM maintained, however, that the violations, if any, were not deliberate. It reiterated its earlier interpretation of Section 22.43 and further cited an order by the Commission which it claimed recognized that confusion had existed among permittees about the meaning of the terms "construction" and "ready for operation" following the Commission's revision of Part 22 (Public Mobile Radio Services) of the Rules.[6]

6. In its *NAL*, the Bureau ruled that T-COM had failed to meet the technical requirements of Section 22.43 of the Rules but found no evidence to support Zachs' contention that the violations were deliberate or that T-COM had intentionally filed false completion of construction notifications with the Commission. The Bureau agreed with T-COM that some confusion and uncertainty existed regarding Section 22.43 at the time of the violations and that this confusion could reasonably explain T-COM's actions.[7] The Bureau also found credible T-COM's claim that it believed that it was in compliance with the requirements of Section 22.43 at the time it filed its completion of construction notifications. For these reasons, the Bureau rejected the strict application of Section 22.43 urged by Zachs and concluded that the authorizations remained valid at all times. The Bureau also found that T-COM had relocated Station KNKD576 without first obtaining Commission approval but similarly concluded that the violation was not deliberate.[8] With respect to the allegation that T-COM had prematurely assigned the licenses for the stations to API, the Bureau reviewed the evidence and determined that no unauthorized assignment had occurred.[9] Based on the facts and circumstances surrounding T-Com's violations, the Bureau concluded that the imposition of a monetary forfeiture was the appropriate sanction. The Bureau, therefore, authorized the pending assignment of licenses and issued a Notice of Apparent Liability for a $5,000 forfeiture.[10] T-COM paid the forfeiture.

II. CONTENTIONS ON REVIEW

7. In its application for review, Zachs contends that the Bureau misapplied applicable precedent in finding that Section 22.43 of the Rules was ambiguous at the time of the violations and abused its discretion by granting the assignment applications and merely levying a fine against T-COM. According to Zachs, the Bureau's findings that the facilities were not timely constructed and that the notifications were improperly filed cannot be squared with its decision to permit the assignment of the station authorizations. Zachs argues that since T-COM had failed to complete construction within the specified twelve-month period, T-COM's construction permits expired under Section 22.43 and, therefore, could not be assigned. Zachs contends that, in any event, the Bureau should have cancelled the frequency authorizations and made them available again to qualified applicants. Zachs claims, in effect, that the Bureau should not have looked at intent as an indicia of the remedy to be determined.

8. In opposition, API contends that Zachs cites no supporting authority for his proposition that the Bureau abused its discretion with regard to both the sanction imposed and the authorization of the assignments. API maintains that the Bureau's *NAL* demonstrates that the Bureau was cognizant of the uncertainty surrounding the technical meaning of the term "construction," contained in Section 22.43 and properly concluded that T-COM's erroneous interpretation of the rule led to its violation. API argues that Zach's disagreement with the Bureau over the nature and existence of confusion surrounding Section 22.43 is not an adequate basis to support its application for review.

III. DISCUSSION

9. The issue before us is whether the Bureau abused its discretion in granting the assignment applications and not cancelling T-COM's authorization at the end of the 12-month construction period. In the instant case, the Bureau concluded that T-COM had violated Section 22.43 of the rules but found the uncertainty surrounding the meaning of the rule at the time of the violations and T-COM's apparent belief that it was in compliance with the Commission's requirements to be mitigating factors.

10. Originally, Section 22.43(a) required that construction be completed and "the station be ready for operation" within 8 months of the date the construction permit was granted. 47 C.F.R. § 22.43(a) (1982). Part 22 licensees widely believed at that time that it was sufficient to take preliminary steps to be ready to operate but that actual provision of service to the public was not required by the rule.

11. Section 22.43(a) was amended in 1983. Among other things, the rule then required that the station be completed and "ready for operation, as shown by commencement of service tests (§ 22.212) within 12 months" after grant of the authorization. 47 C.F.R. § 22.43(a)(2) (1984). However, Section 22.212 permitted, but did not require, an authorized carrier to perform service tests after completion of construction. The Order adopting the new rule indicated that the Notice of Proposed Rule Making (NPRM) proposed to adopt the rule "to provide that a station must commence operations within 12 months of the grant of the construction permit." 95 FCC 2d at 801.[11] On the other hand, when explaining the adopted rule, the Commission described the requirement as one giving licensees "12 months to complete construction." *Id.* at 802.

12. The *Part 22 Rewrite Reconsideration* again modified Section 22.43(a)(2) to require the station to be completed and "ready for operation, as shown by commencement of service, within 12 months after the grant of the radio station authorization." 47 C.F.R. § 22.43(a)(2) (1986). This change became effective in September 1985, after T-COM filed its notices of completion of construction at issue in this case. Thus, it was not until the *Part 22 Rewrite Reconsideration* that the obligations under the rule to commence operations became clear.

13. In the instant case, the Bureau reviewed the undisputed facts of record and determined that T-COM filed the completion of construction notifications under the erroneous belief that it was in compliance with the Commission's construction and notification requirements. There is no evidence in the record to support the opposite conclusion that T-COM acted other than in good faith in filing the notices. We will therefore deny Zachs' application for review, albeit on a basis other than that relied upon by the Bureau. While Zachs appears to be correct that T-Com's authorizations expired pursuant to the terms

of Section 22.43(a)(3), we find good cause to reinstate the authorizations, *nunc pro tunc*, on our own motion. We emphasize, however, that our disposition of this matter, as set forth more specifically below, in no way diminishes our continuing need and ability to enforce our period of construction and notification requirements. Licensees and permittees are expected to be fully cognizant of the Commission's rules and regulations. Those who violate these requirements do so at great risk to the continuation of their authorizations.

14. We note that at the time in question, and under the current version of the rule, Section 22.43 required that licensees complete construction and provide service to the public within 12 months of the grant of an authorization. The rule does permit, however, the licensee to request an extension of time to complete construction based on causes beyond the licensee's control. Failure to obtain state certification to operate (when requested promptly after the authorization is granted), and the loss of an antenna site shortly prior to the end of the 12-month period for reasons outside of the licensee's control, were and are adequate justifications for granting an extension of time.[12] Both of these grounds apparently existed here, which precluded T-COM from actually providing service to the public from Stations KNKD574 and KNKC345.[13] Therefore, under the rules T-COM should have requested an extension of time to complete construction and provide service to the public instead of filing its Form 489 notice of completion of construction. Nonetheless, we find that it filed the construction notices under the good faith belief that it was in compliance with the period of construction requirements.

15. Given the special factual circumstances presented here -- that T-Com had essentially completed construction and relied on an ambiguous rule in filing certification of completion of construction rather than requesting an extension -- we find good cause to reinstate the authorizations, *nunc pro tunc*, on our own motion. In light of the special circumstances of this case, we believe that the public interest favors reinstatement to avoid further delay in the provision of services to the public by an otherwise qualified carrier. Having so ruled, we find that Zachs has provided no additional facts or arguments that would warrant our reversal of the Bureau's decision to authorize assignment of T-Com's licenses.

16. We further observe that the Communications Act does not require the imposition of the ultimate sanction of revocation in every case of a willful violation of a rule. *See FCC v. WOKO*, 329 U.S. 223 (1946). Rather, Congress left to the Commission the discretion in each particular case to decide appropriate sanctions, weighing the nature of the violations and surrounding circumstances to determine whether the ultimate sanction of revocation should be invoked. 47 U.S.C. § 312(a); *Tulsa Cable Television*, 68 FCC 2d 869, 877 (1978); *Humboldt Bay Video*, 56 FCC 2d 68, 78 n.9 (1975). As a general proposition, the wrongdoing or misconduct must be sufficiently egregious to disqualify the licensee or permittee. We do not believe an isolated, unintentional violation of an ambiguous rule regarding when operation must commence is a basis for revocation.

17. Accordingly, IT IS ORDERED, that T-COM's construction authorizations for Stations KNKC345 (Northford, Connecticut) and KNKD574 (Springfield, Masschusetts) ARE REINSTATED, effective April 10, 1985 and April 23, 1985 respectively.

18. IT IS FURTHER ORDERED, that the Application for Review filed by Henry M. Zachs IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] *See* 47 C.F.R. §§ 22.9, 22.43.

[2] Such payment was made on March 29, 1988 and the assignment was completed on April 6, 1988.

[3] *See NAL*, 3 FCC Rcd at 1773.

[4] Zachs filed a petition to deny the assignment of Station KNKC345. Zachs also filed a petition to deny the assignment of Stations KNKD574 and KNKD576 but made no specific allegations regarding Station KNKD576. A petition to deny the assignment of Stations KNKD574 and KNKD576 was also filed by Airphone Company, Inc. which similarly made no claim of misconduct with respect to Station KNKD576. The allegations contained in both petitions were similar in all relevant respects to those set forth in Zachs' Request for Investigation and, therefore, will not be referred to separately here. All arguments raised by the petitioners were considered by the Bureau in making its ruling.

[5] Also on July 9, 1985, Zachs filed a supplement to his request for investigation in which he claimed that T-COM was preparing to relocate Station KNKC345. Zachs asked the Bureau to prohibit T-COM from relocating the station pending the outcome of the Bureau's investigation. On July 29, 1985, T-Com filed an opposition to Zach's supplement stating that Station KNKC345 had already been relocated and that the Commission had been notified of the move on July 15, 1985.

[6] Part 22 was revised in Revision and Update of Part 22 of the Public Mobile Radio Services Rules, 95 FCC 2d 769 (1983). Subsequently, the Commission issued an order on reconsideration intended to provide clarification of some of the new rules, including, *inter alia*, the notification of status of facilities (Section 22.9) and period of construction (22.43) requirements. *Part 22 Rewrite Reconsideration Order*, 101 FCC 2d 799 (1985). A third order, intended to provide further clarification of these and other requirements, was issued on March 26, 1987. *Further Reconsideration Order*, 2 FCC Rcd 1798 (1987).

[7] *NAL* at para. 9. Specifically, the Bureau stated:

> [P]rior to the 1983 revision, the Rules did not define "construction" or "ready for operation." After the 1983 revision, "ready for operation" was to be "evidenced by the commencement of service" (Section 22.43(a)(2))....After the rewrite, many petitions for reconsideration were filed, and the new Section 22.43 was among the new Rules questioned. In these circumstances, some uncertainty was unavoidable.

[8] *Id.* at para. 12. This finding has not been appealed by Zachs in its application for review.

[9] *Id.* at para. 13, *citing* Telephone Service, Inc., Mimeo No. 35595 (released September 30, 1980). This finding has not been appealed by Zachs in its application for review.

[10] *NAL* at paras. 1, 19.

[11] The NPRM did describe the rule as one requiring the commencement of operations, 47 Fed. Reg. 43,842, 43,844 (Oct. 4, 1982), but the rule itself spoke only of the commencement of service tests.

[12] On the other hand, a licensee's desire to sell the station has never been viewed as a justification to extend the construction deadline.

[13] In fact, it appears that T-COM's failure to obtain state certification for Station KNKD574 was, at least in part, due to the fact that Zachs was challenging T-COM's application for certification at the Massachusetts Public Utility Commission. While it is true that T-COM's failure to connect the power source at both stations is evidence that it was incapable of providing service to the public, because it did not receive the requisite state certification, and had lost the site for its other stations, connecting the power source would have been futile. Thus, the lack of power is not a significant factor in the particular circumstances of this case. There is no evidence in the record that T-COM would not have provided service to the public if it had obtained state certification and a usable antenna location pending Commission action on the transfer request.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re

CARMELITA GOSSARD File No. 63500-88-12-RPS
d/b/a AA BEEP

Notice of Apparent Liability for Forfeiture
Penalty for Station KNKK662 in the Public
Land Mobile Service at Cudjoe Key, Florida

ORDER

Adopted: November 1, 1990; Released: November 15, 1990

By the Chief, Mobile Services Division:

1. On April 29, 1988, the Mobile Services Division issued a Notice of Apparent Liability for Forfeiture (*NALF*) to Carmelita T. Gossard d/b/a AA Beep (Gossard), finding that an apparent violation of Section 22.3 of the Commission's rules had occurred for operating Station KNKK662 at Cudjoe Key, Florida, in an unauthorized manner, and assessed a forfeiture in the amount of $1,890.00.

2. Gossard has taken no action in response to the *NALF*, and the $1,890.00 forfeiture has remained unpaid. As a result, Gossard is hereby being ordered to pay $1,890.00

ORDERING PARAGRAPHS

3. Accordingly, pursuant to Section 503(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 503(b), and Section 1.80(f)(4) of the Commission's rules, 47 C.F.R. § 1.80(f)(4), IT IS ORDERED that Carmelita T. Gossard d/b/a AA Beep FORFEIT to the United States the sum of One Thousand Eight Hundred Ninety Dollars ($1,890.00) for the violation of Section 22.3 of the Commission's rules. Payment of the forfeiture may be made by mailing a check or similar instrument to the Commission within thirty (30) days of release of this Order to: Federal Communications Commission, Fee Section, Finance Branch, P. O. Box 19209, Washington, DC 20036.

4. IT IS FURTHER ORDERED that if said forfeiture is not paid within the period specified, the case will be referred to the Department of Justice for collection pursuant to Section 504(a) of the Communications Act, as amended, 47 U.S.C. § 504(a).

5. IT IS FURTHER ORDERED that a copy of this Order BE SENT to Carmelita T. Gossard d/b/a AA Beep by Certified Mail, Return Receipt Requested.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobiles Services Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WJG MARITEL CORP File No. I-T-D-90-008

Application for authority to close
VHF-FM public local coast station
KIL 929, Ripley, New York.

Application for authority File No. I-T-D-90-009
to close
VHF-FM public local coast station
KVY 604, Sturgeon Bay, Wisconsin.

Application for authority File No. I-T-D-90-010
to close
VHF-FM public local coast station
KIL 924, Stevensville, Michigan.

ORDER AND AUTHORIZATION

Adopted: November 7, 1990; Released: November 14, 1990

By the Chief, International Facilities Division:

1. The above-captioned applications, filed on July 13, 1990 by WJG Maritel Corp. (WJG), request authority pursuant to Section 214 of the Communications Act of 1934, as amended, to discontinue service from VHF-FM public local coast stations KIL 929, Ripley, New York, KVY 604, Sturgeon Bay, Wisconsin and KIL 924, Stevensville, Michigan. Station KIL 929 serves the lakeshore area of Lake Erie in the vicinity of Buffalo, New York. Station KVY 604 serves the lakeshore areas of Lake Michigan, Green Bay and Sturgeon Bay, Wisconsin, including various lakeshore communities. Station KIL 924 serves the lakeshore area of Lake Michigan including suburban Chicago, Illinois and suburban Gary, Indiana. The applications were placed on public notice on July 18, 1990. No comments were received.

2. The basic statutory test to be applied by the Commission in considering applications for discontinuance of common carrier service to a community is found in Section 214(a) of the Act. Under this section, the Commission may permit discontinuance of service upon a finding that "neither the present nor future public convenience and necessity will be adversely affected by the proposed action. Application of this standard presents the Commission with the task of balancing the financial burden that would be imposed on the carrier by continued operation of its facilities with the needs and interests of the user community.[1]

3. In support of its applications, WJG states that traffic at all three stations has been minimal over the past 18 months, causing considerable loss of revenue. According to WJG, the decline in traffic via the subject stations is due, in large part, to alternative service being provided by other VHF-FM stations, cellular telephones and satellite communications networks. Emergency service is provided in all three cases by the U.S. Coast Guard.

4. Upon consideration of the applications and in view of the foregoing, IT IS HEREBY CERTIFIED that neither the present nor future public convenience and necessity will be adversely affected by the discontinuance of service via the instant stations.

5. Accordingly, IT IS ORDERED that applications File Nos. I-T-D-90-008, I-T-D-90-009 and I-T-D-90-010 ARE GRANTED, and WJG is authorized to discontinue service via VHF-FM public local coast stations KIL 929, Ripley, New York, KVY 604, Sturgeon Bay, Wisconsin and KIL 924, Stevensville, Michigan.

6. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

FOOTNOTE

[1] *Public Coast Radiotelegraph Stations*, 67 FCC 2d 791, 795 (1978).

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
October 24, 1990

Released: November 15, 1990

South Central 8940-DEB
Communications Corporation
John D. Engelbrecht
Knoxville Channel 8 Limited Partnership
c/o Edward S. O'Neill, Esq.
Bryan, Cave, McPheeters & McRoberts
1015 Fifteenth Street, N.W.
Suite 1000
Washington, D.C. 20005

Gentlemen:

This refers to the petition of South Central Communications Corporation (SCCC), John D. Engelbrecht (Engelbrecht) and Knoxville Channel 8 Limited Partnership (Knoxville Partnership), filed December 13, 1989, for permanent waiver of the Commission's one-to-a-market rule, 47 C.F.R. Section 73.3555(b)(2) to permit SCCC and Engelbrecht (its principal owner) to retain their interests in stations WKXT-TV, Channel 8 (CBS), and WEZK(FM), Knoxville, Tennessee. Petitioners' request is unopposed. Section 73.3555(b)(2) of the Commission's Rules generally prohibits the holding of attributable interests in a television station and an FM broadcast station licensed to the same community. However, petitioners were granted a temporary waiver - an eighteen-month period (from June 9, 1989) - to come into compliance with the one-to-a-market rule. *Knoxville Channel 8 Limited Partnership*, 4 FCC Rcd 4760 (1989). Petitioners now seek to make the temporary waiver permanent.

In order to understand petitioners' request fully, a brief history of this proceeding is necessary. In 1982, ten competing applications, including that of SCCC, were designated for comparative hearing seeking authority to operate a new television station on Channel 8 in Knoxville, Tennessee. SCCC was also the licensee of WEZK(FM), Knoxville, Tennessee. Pursuant to SCCC's request, the hearing order contained a condition requiring SCCC, in the event it was the successful applicant, to divest all of its interest in, and connection with, WEZK(FM) prior to the commencement of operation of the television station on Channel 8. After extensive hearings, by Order released October 4, 1988 (FCC 88I-097), the Adjudication Division of the Office of General Counsel (OGC), pursuant to delegated authority, approved a settlement among the applicants and granted the construction permit to Knoxville Partnership. Knoxville Partnership is comprised of two of the former applicants, Tennessee Telecorp, Inc. (TTI) and SCCC, and their respective principals. TTI and SCCC are limited partners holding 25% and 69% equity interests, respectively. Engelbrecht, SCCC's principal owner, and the five principals of TTI are all general partners (which are attributable interests), each holding a one percent equity interest in the partnership. Although Engelbrecht did not control Knoxville Partnership, OGC granted the construction permit to Knoxville Partnership subject to the same divestiture condition that had been imposed in the original hearing designation order on any grant to SCCC. Subsequently, SCCC and Knoxville Partnership requested an 18-month waiver of Section 73.3555 of the Commission's Rules relative to the divestiture condition. The Commission, on June 9, 1989, granted a temporary 18-month waiver to SCCC to come into compliance with the one-to-a-market rule. *Knoxville Channel 8 Limited Partnership, supra.*

In support of its request for permanent waiver, petitioners first contend that the unique history of the acquisition of the interests at issue compels, in itself, a grant of the requested waiver. Petitioners state that the television interests in question arise from a unique set of circumstances which have bred an "unnecessary and seemingly inequitable result" to one of the Commission's oldest licensees and its "foremost UHF pioneer." As a consequence of its desire to provide improved technical service to the Knoxville community and the Commission's decision not to permit SCCC to modify its Channel 26 license to Channel 8, SCCC argues that it was compelled to participate in the comparative hearing for a new VHF channel in Knoxville (Channel 8) as a result of the reasonably certain demise of UHF station WTVK-TV once VHF Channel 8 became operational. It states:

> [T]hus, as a practical matter, it was then universally acknowledged that a new operation on VHF Channel 8 at Knoxville would inevitably secure an affiliation with one of the three national networks; that Station WTVK would be left without such an affiliation; and that, as an independent operation, WTVK would likely not survive notwithstanding its prior quarter-of-a-century service to Knoxville.

Because the other applicants were structured to gain maximum advantage from the Commission's comparative criteria, SCCC states that it then felt compelled to propose divestiture of station WEZK(FM) in the event that SCCC's application were ultimately granted.

Second, petitioners argue that the settlement of the Channel 8 proceeding was driven principally by the protracted delay which had already occurred and by the prospect of more years of litigation before a final, ultimate decision would be made. Petitioners also observe that the settlement of the Knoxville "Channel 8" hearing resulted in the dismissal of SCCC's modification application, the surrender of SCCC's license for station WTVK-TV, and SCCC and Engelbrecht obtaining noncontrolling interests in the Channel 8 licensee. It was, SCCC contends, only in the context of modifying the facilities from Channel 26 to Channel 8 that it proposed divestiture of all interests in station WEZK(FM), yet that modification application, as such, was never granted. Accordingly, petitioners state the ultimate interests of SCCC and Mr. Engelbrecht in the successor television operation were markedly less than the total ownership and control which had appropriately been "grandfathered" for the preceeding 25 years. Petitioners contend that while SCCC would have controlled a VHF station, Engelbrecht's and SCCC's interests in Knoxville Partnership "is essentially a

passive investment acquired incident to the settlement disposition. . . ." Channel 8 is now controlled, note petitioners, by Knoxville Partnership, not Engelbrecht and SCCC. As initially proposed in the settlement agreement approved by the OGC, each TTI principal has in fact performed the fulltime management functions. Engelbrecht is not employed at station WKXT-TV nor does he hold any management position. Unlike the TTI principals, he does not reside in the Knoxville area, being a resident of Evansville, Indiana. In addition, it is alleged, there is no ownership link between the five TTI general partners and station WEZK(FM), so there is no economic incentive for the TTI partners to permit Engelbrecht to control the television licensee. Also, stations WKXT-TV and WEZK(FM) are operated from widely separated studios with autonomous management. Engelbrecht further states that he has had no material involvement in the policy development or operation of Station WKXT-TV. Such policy and operations are dictated and controlled by the other five general partners, all of whom also work fulltime in management positions at the station. Moreover, Engelbrecht contends, he receives no "salary" or other direct compensation from the WKXT-TV operation. Engelbrecht maintains that at all relevant times he has devoted himself principally to overseeing SCCC's other interests from its headquarters in Evansville, Indiana. Engelbrecht pledges that he has absolutely no intention of taking any active role in the policy direction or operation of Station WKXT-TV in the future. He fully expects and intends, he states, that his role will continue to be limited to a de minimis involvement, which as a practical and legal matter, affords him no power or right to affect station policy or operation even if he so desired.

Next, petitioners contend that the requested waiver is further supported by the large number of separately owned radio and television stations in the Knoxville market as well as the high rate of cable television penetration and availability of other mass media services. Although Knoxville is ranked as the 60th largest television market in the nation (Arbitron, 1988-1989), petitioners submit data demonstrating a total of 38 television and radio stations operating in the relevant Knoxville radio and television markets. Of that total, petitioners point out that 26 of such stations are under separate ownership. Concerning cable television data, there are 226,000 subscribers - for a penetration level of 61.9%. In addition, there are some 269,100 VCR TV households (63%). Daily and weekly newspaper circulation within the market is some 316,000.

With respect to the performance of the two stations in the market, petitioners contend that stations WEZK(FM) and WKXT-TV do not have an important market share in Knoxville. WKXT-TV is ranked third overall among the three Knoxville network affiliates (Neilsen/Arbitron, May, 1989). Based on recent Arbitron data for Knoxville, according to petitioners, four other radio stations attract approximately 70% of the market. In the summer of 1989, station WEZK(FM) had a 9.7% share of the market, which dropped to an 8.2% share for the winter of 1990. According to the "Birch/Scarborough Report" issued in June, 1990, and reporting the results of telephone interviews conducted in the market during the months of April and May, 1990, petitioners state that the five Knoxville FM stations have the following market shares:

WIVK	28.0%
WIMZ	17.0%
WMYU	14.7%
WOKI	15.1%
WEZK	5.2%
	80.0%

Finally, Engelbrecht states that he has been unable to find a buyer for station WEZK(FM). He states that since early 1989, he has held discussions with numerous potential purchasers for station WEZK(FM). In addition, on June 27, 1989, he entered into a written, exclusive brokerage contract with R.A. Marshall & Company, which developed a comprehensive, written analysis and sales presentation for the station and widely circulated it. Subsequently, the brokerage agreement term was extended for an additional 120-day term. These efforts were not successful. Petitioners state that the only offers received included long-term deferrals of a substantial part of the offered price and, "notably, the total price offered, was even less than the industry-recognized 'stick value' of such FM facility in the Knoxville market."

DISCUSSION

Although section 73.3555(b) generally proscribes the holding of an attributable interest in a television station and a radio station in the same community of license, the Commission has adopted a waiver standard for cases satisfying certain criteria. Thus, Note 7 to section 73.3555(b) provides that the Commission will look favorably upon waiver applications that meet either of the following two standards: (1) those involving radio and television station combinations in the top-25 television markets where there will be at least 30 separately owned, operated and controlled broadcast licensees after the proposed combination, as determined by counting licensees in the relevant ADI and television metropolitan markets; and (2) those involving "failed" broadcast stations that have not been operated for a subtantial period of time or are in bankruptcy. Other waiver requests that do not meet these standards will be evaluated on a case-by-case basis, as set forth in the Second Report and Order in MM Docket No. 87-7, 4 FCC Rcd 1741 (1989), recon. denied in part and granted in part, 4 FCC Rcd 6489 (1989).

In evaluating waiver requests under the case-by-case analysis we consider five public interest criteria: (1) potential public service benefits such as economies of scale, cost savings, and programming and other service benefits; (2) types of facilities involved; (3) number of stations already owned by the applicant; (4) financial difficulties of the station(s); and (5) nature of the market in light of the Commission's diversity and competition concerns.

Utilizing the factors enumerated in Note 7, we have carefully reviewed petitioners' request for permanent waiver and the detailed showings submitted in support thereof, and we conclude that a permanent waiver of the one-to-a-market rule in this case would serve the public interest, convenience and necessity. We first point out that the Commission does not require that all five criteria be satisfied as a precondition to grant of a waiver. See Reconsideration Order, supra, at 6491, Great American Television and Radio Co., Inc., 4 FCC Rcd 6347 (1989) and Duane J. Polich, 4 FCC Rcd 5596 (1989). We also note that this situation - where the parties with attrib-

utable interests (Engelbrecht and SCCC) do not have outright control of both facilities - is not the typical case we usually examine under Note 7. Because Engelbrecht and SCCC do not control WKXT-TV, and stations WKXT-TV and WEZK(FM) are operated separately, it is not necessary to discuss claims of beneficial economies of joint operation. Compare Great American, supra. Nor does this situation require any discussion of financial difficulties of the subject stations because no claim of difficulty has been proffered. Moreover, other than the subject stations, petitioners have no other interests in Knoxville. With respect to the types of facilities in question, they are not insubstantial. WKXT-TV is a VHF network affiliate operating with 316 kW visual power at 382 meters height above average terrain (HAAT). Station WEZK(FM) operates on 97.5 MHz with 100 kW output power at an antenna height of 347 meters (HAAT).

In making our analysis, therefore, our focus is on the last enumerated factor; that is, the nature of the market in light of the Commission's diversity and competition concerns. From our review of the record and history of this matter, we are persuaded that grant of the waiver will not result in undue concentration of the media nor create any significant detriment to the diversification policies underlying the multiple ownership rules. First, as a result of a settlement, Engelbrecht and SCCC have reduced their holdings from controlling a grandfathered radio/television combination to a controlling interest in the radio station and an attributable but noncontrolling interest in the television station. We consider the elimination of the de jure common control and the absence of any de facto control to be a critical factor in our consideration of this case. Second, petitioners have demonstrated that Engelbrecht and SCCC are not substantially involved in the day-to-day operations of station WKXT-TV. Engelbrecht is only one of the six general partners. The other five general partners were principals of a former applicant for Channel 8. The TTI partners reside in the community of license and hold the management positions in the station. A vote of the majority of the general partners governs the operation of the station. Engelbrecht is not involved in the daily management of WKXT-TV and has represented that he will not become so involved. Third, although not a top-25 television market, petitioners have demonstrated that Knoxville has a robust level of voice diversity and economic competition among media outlets. Petitioners have demonstrated the existence of 38 television and radio stations in the relevant markets - 26 of which are under separate control. Both cable penetration and VCR TV households exceed 60%. Additionally, there are two daily newspapers in the Knoxville market. Fourth, while the facilities of stations WKXT-TV and WEZK(FM) are not insubstantial, they have been shown to be far from being dominant stations in the market. Fifth, despite substantial efforts, Engelbrecht has been unable to dispose of station WEZK(FM). Finally, the stations are separately staffed and operated.

Thus, a review of the record before us, including the representations made, leads to the conclusion that grant of the requested waiver would serve the public interest. However, because grant of this request is based on the unique situation and circumstances presented, we will not permit any future increase in Engelbrecht's equity or involvement in station WKXT-TV, or the use of shared staffs, consultants or resources, without prior Commission approval.

Accordingly, the petition of South Central Communications Corporation, John D. Engelbrecht and Knoxville Channel 8 Limited Partnership for permanent waiver of Section 73.3555(b) of the Commission's Rules to permit SCCC and Engelbrecht to retain their interests in stations WKXT-TV and WEZK(FM), Knoxville, Tennessee, IS GRANTED. This letter was adopted by the Commission on October 24, 1990.

BY DIRECTION OF THE COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] At that time SCCC was the licensee of UHF station WTVK-TV, Channel 26, in Knoxville, and sought to modify its license to operate on Channel 8.

[2] SCCC acquired WTVK (TV) in 1954. It acquired WEZK (FM) IN 1964 and had operated both WTVK-TV and WEZK (FM) in Knoxville since that time.

[3] For example, TTI was comprised of five equal shareholders, all of whom were long-term residents of the Knoxville area. Each of them proposed to work fulltime in management positions at the new television station.

[4] The principals occupy the following positions: General Manager, News Director, Personnel and Sports Director, Promotions Director and General Sales Manager.

[5] Petitioners represent that Engelbrecht is principally involved in overseeing the operations of stations WIKY AM-FM, Evansville, Indiana and station WZEZ, Nashville, Tennessee, as well as various low power stations, paging authorizations and Muzak franchisees in several markets.

[6] "Stick Value", according to petitioners, is the license and equipment value only, without recognition of a going business value, that is where the station owner has "run it into the ground with no ratings, no clear position in the market, and a negative cash flow."

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-17

In the Matter of

Amendment of Section 73.202(b), RM-7113
Table of Allotments,
FM Broadcast Stations.
(Pacific Grove and Soledad,
California)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 30, 1990; Released: November 15, 1990

By the Assistant Chief, Policy and Rules Division:

1. Before the Commission for consideration is the *Notice of Proposed Rule Making*, 5 FCC Rcd 635 (1990), issued in response to a petition for rule making filed by C. R. Pasquier Properties, Inc. (petitioner), licensee of Station KOCN(FM), Channel 285A, Pacific Grove, California, proposing the substitution of Channel 286B1 for Channel 285A at Pacific Grove and modification of the license for Station KOCN(FM) to specify operation on the higher powered channel. Additionally, Channel 292A was proposed as a substitute for Channel 287A at Soledad,[1] California, as requested, in order to accommodate the Pacific Grove substitution. Petitioner filed supporting comments in response to the *Notice*. No other comments were received.

2. As indicated in the *Notice*, Channel 286B1 can be allotted to Pacific Grove at the petitioner's specified site located 21.7 kilometers (13.5 miles) southeast of the community,[2] consistent with the minimum distance separation requirements of the Commission's Rules. Channel 292A can be used at the site specified in the outstanding construction permit awarded to Soledad Radio, [3] and requires no change beyond its channel of operation.

3. We believe the public interest would be served by substituting Channel 286B1 for Channel 285A at Pacific Grove since it could provide an expanded coverage area FM service to the community. Therefore, in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein the license of Station KOCN(FM) to specify operation on Channel 286B1 in lieu of Channel 285A at Pacific Grove.[4] We are also modifying the construction permit issued to Soledad Radio (File No. BPH-880602OC) to specify Channel 292A at Soledad in lieu of Channel 287A.[5]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 31, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

City	Channel No.
Pacific Grove, California	286B1
Soledad, California	292A

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the license issued to C. R. Pasquier Properties, Inc. for Station KOCN(FM), IS MODIFIED effective **December 31, 1990,** to specify operation on Channel 286B1 in lieu of Channel 285A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the permit of Soledad Radio Limited Partnership (File No. BPH-880602OC), IS MODIFIED, effective **December 31, 1990,** to specify operation on Channel 292A in lieu of Channel 287A, subject to the following conditions:

(a) Nothing contained herein shall be construed as authorizing any change in the permit (BPH-880602OC) except the channel, as specified above. Any other changes, except for those so specified under Section 73.1690 of the Rules, require prior authorization pursuant to an application for construction permit (FCC Form 301); and

(b) Program tests may be conducted in accordance with the provisions of Section 73.1620 of the Rules, PROVIDED the transmission facilities comply in all respects with its permit (BPH-880602OIC) except for the channel as specified above and a license application (FCC Form 302) is filed within ten (10) days of commencement of program tests.

7. IT IS FURTHER ORDERED, That the Secretary of the Commission SHALL SEND BY CERTIFIED MAIL, RETURN RECEIPT REQUESTED, a copy of this *Report and Order* to the licensee of Station KOCN(FM), and to Soledad Radio Limited Partnership, permittee at Soledad, as follows: C. R. Pasquier Properties, Inc., Radio Station KOCN(FM), P.O. Box KOCN, Pacific Grove, CA 93950, and Soledad Radio Limited Partnership, 329 Walnut Place, King City, CA 93930.

8. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

9. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Three applications were pending for Channel 287A at Soledad when the *Notice* in this proceeding was issued. One application was ultimately dismissed. As a result of a settlement agreement, the application of Soledad Radio Limited Partnership ("Soledad Radio") (File No. BPH-880602OC) was granted by the Administrative Law Judge, and conditioned upon the outcome of the instant proceeding. *See* MM Docket No. 90-149.

[2] Coordinates at the petitioner's specified site for Channel 286B1 at Pacific Grove are 36-30-38 and 121-43-57.

[3] Coordinates specified in the construction permit (File No. BPH-880602OC) of Soledad Radio are 36-22-48 and 121-12-57.

[4] Because the petition that resulted in this allotment was filed prior to October 2, 1989, the licensee may avail itself of the provisions of Section 73.213(c) of the Commission's Rules. *See* 47 CFR § 73.213(c).

[5] The Commission served Soledad Radio with a copy of the *Notice*, and the award of its construction permit was conditioned on the outcome of this proceeding. Thus, Soledad Radio was put on notice that the Commission was actively considering changing the channel in Soledad. Therefore, it is not entitled to reimbursement even though it became a permittee during the pendency of this proceeding. *See Bayou Vista and Franklin, LA*, 34 RR 2d 1540 (1975).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-317

In the Matter of

Amendment of Section 73.202(b), RM-7312
Table of Allotments,
FM Broadcast Stations.
(Nags Head, North Carolina)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 30, 1990; Released: November 15, 1990

By the Assistant Chief, Policy and Rules Division:

1. At the request of Coastal Radio, Inc. (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 3804 (1990), proposing the substitution of Channel 223C3 for Channel 222A at Nags Head, North Carolina, and modification of the construction permit of Station WNHW to specify operation on the higher powered channel. Petitioner filed comments reiterating its intention to apply for Channel 223C3, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 223C3 for Channel 222A at Nags Head, North Carolina, since it could provide the community with a wide coverage area FM service. Channel 223C3 can be allotted to Nags Head in compliance with the Commission's minimum distance separation requirements with a site restriction of 7.7 kilometers (4.8 miles) south to avoid a short-spacing to Station WYFL, Channel 223C, Henderson, North Carolina.[1] As proposed, we will also modify Station WNHW's construction permit to specify operation on Channel 223C3 in accordance with Section 1.420(g) of the Commission's Rules.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 31, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Nags Head, North Carolina	223C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Coastal Radio, Inc., for Station WNHW, Nags Head, North Carolina, IS MODIFIED to specify operation on Channel 223C3, in lieu of Channel 222A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 223C3 at Nags Head are North Latitude 35-53-22 and West Longitude 75-35-54.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-543

In the Matter of

Amendment of Section 73.202(b), RM-7530
Table of Allotments,
FM Broadcast Stations.
(Ripley, Ohio)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 31, 1990; Released: November 15, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by James P. Gray (petitioner) requesting the substitution of Channel 258C3 for Channel 258A at Ripley, Ohio, and the modification of his construction permit for Station WXKD to specify operation on the higher powered channel. Petitioner states that he will apply for Channel 258C3, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 258C3 for Channel 258A at Ripley, Ohio, since it could provide the community with its first wide coverage area FM service. Channel 258C3 can be allotted to Ripley in compliance with the Commission's minimum distance separation requirements with a site restriction of 20.1 kilometers (12.5 miles) southwest of the community to avoid a short-spacing to Station WNXT-FM, Channel 257A, Portsmouth, Ohio, and to accommodate petitioner's desired transmitter site.[1] As requested, we also propose to modify petitioner's construction permit for Station WXKD to specify operation on Channel 258C3. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 258C3 at Ripley or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Ripley, Ohio	258A	258C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 7, 1991,** and reply comments on or before **January 22, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Thomas P. Gray
10 Trinity Place
Fort Thomas, Kentucky 41075
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 258C3 are North Latitude 38-37-30 and West Longitude 84-01-05.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-232

In the Matter of

Amendment of Section 73.202(b), RM-7223
Table of Allotments,
FM Broadcast Stations.
(Dickinson, North Dakota)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 31, 1990; Released: November 15, 1990

By the Assistant Chief, Policy and Rules Division:

1. At the request of Dickinson Broadcasting Corporation (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 2807 (1990), proposing the allotment of Channel 256C1 to Dickinson, North Dakota, as the community's second local FM service. Petitioner filed comments reiterating its intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by allotting Channel 256C1 to Dickinson, North Dakota, since an interest has been expressed in providing the community with its second local FM service. Channel 256C1 can be allotted to Dickinson in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] Canadian concurrence has been received since Dickinson is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 31, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Dickinson, North Dakota	221C3, 256C1

4. The window period for filing applications will open on **January 2, 1991,** and close on **February 1, 1991.**

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 256C1 are North Latitude 46-52-48 and West Longitude 102-47-18.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-544

In the Matter of

Amendment of Section 73.202(b), RM-7527
Table of Allotments,
FM Broadcast Stations.
(Walker, Minnesota)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 31, 1990; Released: November 15, 1990

By the Assistant Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed by Thomas E. Ferebee (petitioner) requesting the substitution of FM Channel 256C1 for Channel 256C2 at Walker, Minnesota.[1] Petitioner also requests modification of its construction permit for Station KLLR-FM, Channel 256C2, to specify operation on Channel 256C1. Petitioner submits information in support of his proposal and states his intention to apply for the channel.

2. We believe petitioner's proposal warrants consideration because the proposed allotment could provide a wider area FM service to Walker, Minnesota. Channel 256C1 can be allotted to Walker, Minnesota, in compliance with the minimum distance separation requirements of the Commission's Rules at petitioner's specified site, which is located 28.3 kilometers (17.6 miles) northwest of the community.[2] Since Walker is located within 320 kilometers (200 miles) of the U.S. -Canadian border, concurrence of the Canadian government will be requested. We shall also propose to modify the construction permit for Station KLLR-FM, Channel 256C2, to specify operation on Channel 256C1 in accordance with Section 1.420(g) of the Commission's Rules.

3. In view of the above, the Commission believes it is appropriate to propose amending the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Walker, Minnesota	256C2	256C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 7, 1991,** and reply comments on or before **January 22, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Clifford M. Harrington
Matthew P. Zinn
Fisher, Wayland, Cooper
and Leader
1255 23rd Street, N.W., Suite 800
Washington, D.C. 20037-1125
(Counsel for the petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] KLLR-FM is the subject of a pending application for assignment from Thomas E. Ferebee to Sioux Valley Broadcasting Co. (hereinafter referred to as "Ingstad Broadcasting") (FCC File No. BAPLH-900906EB). Consequently, Ingstad Broadcasting joins Thomas E. Ferebee in filing this petition for Rule Making.

[2] The coordinates for Channel 256C1 are 47-12-42 and 94-55-02.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-545

In the Matter of

Amendment of Section 73.202(b), RM-7504
Table of Allotments,
FM Broadcast Stations.
(Copperas Cove, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 31, 1990; Released: November 15, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Cove Broadcasting Company (petitioner) requesting the substitution of Channel 276C3 for Channel 276A at Copperas Cove, Texas, and modification of the license of Station KOOV to specify operation on the higher powered channel. Petitioner states that it will apply for the channel, if allotted.

2. We believe the public interest would be served by substituting Channel 276C3 for Channel 276A at Copperas Cove, Texas, since it could provide the community with a wide coverage area FM service. Channel 276C3 can be allotted to Copperas Cove in compliance with the Commission's minimum distance separation requirements with a site restriction of 14.8 kilometers (9.2 miles) southwest to avoid a short-spacing to Channel 277C3 at Clifton, Texas.[1] This allotment is also contingent upon the issuance of a license to cover the construction permit of Station KCRM, Cameron, Texas, on Channel 280C2 in lieu of its presently licensed Channel 276A. As requested, we also propose to modify petitioner's license for Station KOOV to specify operation on Channel 276C3. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 276C3 at Copperas Cove or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Copperas Cove, Texas	276A	276C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 7, 1991,** and reply comments on or before **January 22, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Richard A. Helmick, Esq.
Cohn & Marks
1333 New Hampshire Avenue, N.W.
Suite 600
Washington, D.C. 20036
(Counsel to petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Fawn Wilderson, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 276C3 at Copperas Cove are North Latitude 31-03-19 and West Longitude 98-02-00.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-502

In re Applications of

MICHELLE ELAINE HULSE, *ET AL.* (hereafter "Hulse") — File No. BPH-890526MG

BEN L. UMBERGER (hereafter "Umberger") — File No. BPH-890530MI

GEYER BROADCASTING CO., INC. (hereafter "Geyer") — File No. BPH-890530MJ

For Construction Permit
for a New FM Station
in Chandler, Indiana
Channel 228A (93.5 MHz)

HEARING DESIGNATION ORDER

Adopted: October 11, 1990; Released: November 15, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Hulse*. The Commission requires that if there will be five or more fulltime station employees, the applicant must complete and file Section VI of Form 301 and supply a statement detailing hiring and promotion policies for women and each minority group whose representation in the available labor force is five percent or greater in the proposed service area. Although Hulse has indicated it will have more than five fulltime employees, it has not filed such statement. Accordingly, Hulse will be required to file an EEO program with the presiding Administrative Law Judge, or an appropriate issue will be specified by the Judge.

3. *Umberger*. Umberger petitioned for leave to amend his application on December 27, 1989, and August 17, 1990. The accompanying amendments were filed after November 24, 1989, the last day for filing amendments as of right. Under Section 1.65, the amendments are accepted for filing. However, an applicant may not improve its comparative advantage after the time for filing amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

4. *Geyer*. A preliminary examination of Geyer's application reveals that it is short-spaced to the proposed allotment of Channel 288A at Drakesboro, Kentucky. Therefore, should Geyer be awarded a construction permit as a result of this proceeding, it will be made contingent on the Commission Rule Making for Drakesboro, Kentucky.

5. *Other Matters*. Whereas the Federal Aviation Administration has determined that the antenna site proposed by Hulse is a hazard to air navigation, no determinations have been received regarding those proposed by Umberger and Geyer. Accordingly, an issue with respect thereto will be included and the FAA made a party to the proceeding.

6. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

7. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine whether there is a reasonable possibility that the tower heights and locations proposed by each of the applicants would constitute a hazard to air navigation.

2. To determine which of the proposals would, on a comparative basis, better serve the public interest.

3. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

8. IT IS FURTHER ORDERED, That within 30 days of the release of this Order, Hulse shall submit Section VI information in accordance with the requirement of Section 73.2080(c) of the Commission's Rules to the presiding Administrative Law Judge.

9. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Umberger ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

10. IT IS FURTHER ORDERED, That, if Geyer is awarded a construction permit as a result of this proceeding, it will be made contingent on the Commission Rule Making for Drakesboro, Kentucky.

11. IT IS FURTHER ORDERED, That the Federal Aviation Administration IS MADE A PARTY to this proceeding with respect to the air hazard issue only.

12. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Di-

vision, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

13. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

14. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-501

In re Applications of

KATE F. THOMAS (hereafter "Thomas") File No. BPH-890424MC

TIMOTHY Z. BARBER D/B/A DOUBLE B BROADCASTING (hereafter "Barber") File No. BPH-890424MD

MARY L. HOOPER AND CAROLYN B. TINSLEY File No. BPH-890424ME

LADY BUG BROADCASTING COMPANY, INC. (hereafter "Ladybug") File No. BPH-890424MF

CHUNKY CREEK RADIO (hereafter "Chunky") File No. BPH-890424MH

For Construction Permit
for a New FM Station on Channel 281C2
in Union, Mississippi

HEARING DESIGNATION ORDER

Adopted: October 11, 1990; Released: November 15, 1990

By the Chief, Audio Services Division:

1. The Commission has before it the above-captioned mutually exclusive applications for a new FM station.

2. *Thomas.* On January 10, 1990 Ladybug prematurely filed a "petition to dismiss" ("petition") the application of Thomas. Ladybug's petition is essentially a petition to specify issues. Since the Commission's *Report and Order* in re *Revised Procedures for the Processing of Contested Broadcasting Applications; Amendments of Part I of the Commission's Rules*, 72 FCC 2d 202, 45 RR 2d 1220 (1979), directed the deletion of all issue pleadings in pending cases, the matters sought to be raised in this petition have not been considered. Accordingly, a opportunity to raise any allegations contained therein will be afforded the parties post-designation pursuant to Section 1.229.

3. *Other Matters.* The applicants below have petitioned for leave to amend their application on the dates shown. The accompanying amendments were filed after August 18, 1989, the last date for filing amendments as of right. Under Section 1.65 of the Commission's Rules, the amendments are accepted for filing. However, an applicant may not improve its comparative position after the time for amendments as of right has passed. Therefore, any comparative advantage resulting from the amendments will be disallowed.

APPLICANTS	AMENDMENTS FILED
Barber	November 14, 1989
Chunky	July 24, 1990; April 20, 1990 December 4, 1989

4. Except as may be indicated by any issues specified below, the applicants are qualified to construct and operate as proposed. Since the proposals are mutually exclusive, they must be designated for hearing in a consolidated proceeding on the issues specified below.

5. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine which of the proposals would, on a comparative basis, best serve the public interest.

2. To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

6. IT IS FURTHER ORDERED, That Ladybug's petition to dismiss IS DISMISSED.

7. IT IS FURTHER ORDERED, That the petitions for leave to amend filed by Barber and Chunky ARE GRANTED, and the corresponding amendments ARE ACCEPTED to the extent indicated herein.

8. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall also be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington, D.C. 20554.

9. IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and any party respondent herein shall, pursuant to Section 1.221(c) of the Commission's Rules, in person or by attorney, within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issues specified in this Order.

10. IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

W. Jan Gay, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-443

In the Matter of

Amendment of Section 73.202(b), RM-6827
Table of Allotments,
FM Broadcast Stations.
(Lake Arthur, Louisiana)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 29, 1990; Released: November 14, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it for consideration the *Notice of Proposed Rule Making*, 4 FCC Rcd 7471 (1989), issued in response to a petition filed by Jefferson Davis Broadcasting Corporation (petitioner), proposing the substitution of FM Channel 297C3 for Channel 297A at Lake Arthur, Louisiana. Petitioner also requested modification of its construction permit for Channel 297A to specify operation on the new channel. Petitioner filed supporting comments in which it reaffirmed its interest in the channel. No other comments were received.

2. We believe the public interest would be served by the substitution of Channel 297C3 for Channel 297A at Lake Arthur, Louisiana, since it could provide the community with an expanded FM service. The substitution can be made in compliance with the minimum distance separation requirements of Section 73.207 of the Commission's Rules at petitioner's specified site, which is located 17.9 kilometers (11.1 miles) northeast of the community.[1]

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 31, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED for the community listed below, to read as follows:

Community	Channel No.
Lake Arthur, Louisiana	297C3

4. IT IS FURTHER ORDERED, pursuant to the authority contained in Section 316 of the Communications Act of 1934, as amended, that the construction permit for Channel 297A, Lake Arthur, Louisiana, IS MODIFIED to specify operation on Channel 297C3, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall file with the Commission a minor change application for construction permit (Form 301), specifying the new facility.

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Andrew J. Rhodes, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 297C3 are 30-07-01 and 92-51-35. Since this allotment is made as a result of a petition for rule making filed prior to October 2, 1989, the permittee may avail itself of the provisions of Section 73.213(c) of the Commission's Rules. *See* CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

Catskills RSA Limited Partnership — File No. 10826-CL-P-563-B-89

For facilities in the Domestic
Public Cellular Telecommunications
Radio Service on Frequency Block B
in Market No. 563, New York 5 - Otsego

MEMORANDUM OPINION AND ORDER

Adopted: November 1, 1990; Released: November 13, 1990

By the Chief, Mobile Services Division:

I. INTRODUCTION

1. On June 18, 1990, United States Cellular Corporation (USCC) filed a Petition to Set Aside Settlement Agreement and For Other Relief with regard to the captioned application of Catskills RSA Limited Partnership (Catskills Partnership). USCC asks that the settlement agreement be set aside and that a lottery be held for frequency Block B in the New York 5 - Otsego Rural Service Area (Otsego RSA). For the reasons set forth herein, we deny USCC's petition.

II. BACKGROUND

2. The wireline applicants for the Otsego RSA entered into a pre-lottery, full market settlement agreement on July 12, 1989. On November 6, 1989, New York Cellular Geographic Service Area, Inc. (NY Cellular), one of the applicants, reported this settlement and the formation of Catskills Partnership as the surviving applicant. NY Cellular submitted that, as a result of the settlement, the wireline applicants should not be placed in the lottery the Commission had scheduled for November 8, 1989. One of the settling applicants was Margaretville Cellular Telephone Company (Margaretville Cellular).[1] Margaretville Cellular is owned by Margaretville Telephone Company (Margaretville Telephone) and USCC with 51% and 49% interests, respectively.

3. In a November 7, 1989 letter to the Chief, Mobile Services Division, USCC asserted that the settlement agreement signed by Mr. Douglas Hinkley on behalf of Margaretville Cellular had not been authorized by Margaretville Cellular, that the terms of the settlement agreement had not been approved, and that the procedure for obtaining corporate authority had not been followed. Thus, according to USCC, a valid full market settlement had not been reached. USCC requested the Commission to hold the lottery for the Otsego RSA pending resolution of the intra-corporate dispute within Margaretville Cellular. Margaretville Cellular opposed USCC's request, arguing that Mr. Hinkley had executed Margaretville Cellular's initial cellular application. The Commission thereupon announced that there had been a full market settlement for RSA 563. *See* Public Notice, Report No. CL-90-33 (released November 9, 1989).

4. On January 5, 1990, Catskills Partnership filed an amendment to its application that lists Margaretville Telephone as a limited partner having an 11.2% interest in Catskills Partnership. The amendment also included the limited partnership agreement, signed July 12, 1989.

5. In Public Notice, Report No. CL-90-94 (released February 2, 1990), the Commission announced that pursuant to the full market settlement in the Otsego RSA, Catskills Partnership was the applicant and therefore no lottery had been conducted for this market. Subsequently, the Commission named Catskills Partnership the wireline tentative selectee for the Otsego RSA. *See* Public Notice, Report No. CL-90-165 (released April 30, 1990).

III. CONTENTIONS OF THE PARTIES

6. In its petition, USCC contends that the July 12, 1989 settlement is not a full market settlement. USCC asserts that the settlement agreement was signed on behalf of Margaretville Cellular by Douglas Hinkley, an employee of Margaretville Telephone. USCC reiterates from its November 7, 1989 request for a lottery for the Otsego RSA, *see* para. 3, *supra*, that Mr. Hinkley had no authority to sign the settlement agreement on behalf of Margaretville Cellular. USCC further asserts that neither the pre-lottery settlement agreement nor Mr. Hinkley's authority to act on behalf of Margaretville Cellular was presented to Margaretville Cellular for consideration and that USCC did not learn until two days before the lottery scheduled for November 8, 1989 that a settlement agreement had been executed. USCC also states that because Margaretville Telephone and not Margaretville Cellular is signatory to the partnership agreement for Catskills Partnership, Margaretville Cellular, including USCC, has been left with no interest in the partnership. Consequently, says USCC, it was deprived of its 49% ownership interest in Margaretville Cellular without its consent.

7. USCC submits that it has unsuccessfully attempted to resolve this matter with Margaretville Telephone and has filed a complaint against Margaretville Telephone in the U.S. District Court for the Northern District of New York. USCC says that it recognizes that the Commission is reluctant to address contractual disputes between parties. Nevertheless, it asserts, it is beyond dispute that Mr. Hinkley had no authority to bind Margaretville Cellular to a settlement that conferred benefit solely to Margaretville Telephone and gave away USCC's share of Margaretville Cellular. USCC contends that there is no material question as to the lack of authority by Mr. Hinkley to execute the settlement agreement. USCC argues that under these circumstances the Commission must find that the settlement agreement was not a full market settlement and a lottery must be held. In the alternative, USCC asks that the Commission condition whatever grant it makes in this proceeding on the outcome of the proceeding in the U.S. District Court.

8. In its opposition, Catskills Partnership contends that USCC's petition is untimely filed. Catskills Partnership asserts that the February 2, 1990 Public Notice, *supra*, announcing that the new partnership was the applicant of record and that a lottery would not be conducted, provided clear notice to USCC that the Commission had rejected USCC's request for relief of November 7, 1989.

Catskills Partnership asserts that USCC failed to seek reconsideration within thirty days of the February, 1990 Public Notice as required by the Commission's rules,[2] and its petition should be dismissed.

9. Catskills Partnership also argues that the USCC petition fails to provide any basis why the Commission should reconsider its action as reflected in the February, 1990 Public Notice. Catskills Partnership contends that USCC provides no evidentiary support, including any documents, for its position that Mr. Hinkley did not have authority to bind Margaretville Cellular to the settlement agreement. Catskills Partnership asserts that Mr. Hinkley signed the settlement agreement on behalf of Margaretville Cellular as its general manager, and therefore, the Commission could conclude that in this capacity, Mr. Hinkley was a duly authorized employee of Margaretville Cellular who had apparent authority to bind the company. Catskills Partnership also says that the USCC allegation regarding execution of the settlement agreement could raise an issue of illegal control by USCC, a non-eligible carrier in the Otsego RSA, over Margaretville Cellular. Catskills Partnership asserts that, under Commission policy, Margaretville Telephone, the 51% owner of Margaretville Cellular, is required to have control and responsibility over the operations of Margaretville Cellular. Catskills Partnership maintains that to the extent an agreement between Margaretville Telephone and USCC permits USCC to interfere with Margaretville Telephone's business decisions, Margaretville Cellular would be ineligible for the license. Catskills Partnership cites Montgomery *Independent Cellular Telephone Company, Inc.*, 4 FCC Rcd 2323 (1989). In addition, Catskills Partnership asserts that a Commission proceeding is not the proper forum to resolve the private contractual dispute between USCC and Margaretville Telephone.

IV. DISCUSSION

10. We find that the Public Notice of February 2, 1990 was an interlocutory action against which a petition for reconsideration could not be entertained pursuant to Section 1.106(a)(1) of the rules. [3] At the stage it was put on public notice in this proceeding, the announcement of the full market settlement was merely an intermediate step that the Division took in processing the surviving cellular application of the settlement applicant. Under the rules, the first opportunity that USCC had to file a pleading concerning the settlement applicant, Catskills Partnership, was by filing a petition to deny within 45 days of the public notice announcing the tentative selectee pursuant to Section 1.823 (b).[4] The USCC petition is in essence a petition to deny the application of the settlement applicant that had been announced as tentative selectee. USCC filed its petition within the 45 days that began to run from issuance of the April 30, 1990 Public Notice announcing Catskills Partnership as the tentative selectee.[5] Therefore, we conclude that the petition was timely filed.

11. Regarding the merits of USCC's petition, we find that USCC fails to substantiate its allegation that Mr. Hinkley, who signed the settlement agreement as the general manager of Margaretville Cellular, did not have the necessary authority to do so. The USCC argument that USCC did not give its consent to the settlement agreement does not support USCC's claim that Mr. Hinkley's signature was unauthorized. Therefore, we find that USCC has not shown that the settlement agreement and the grant of an authorization to Catskill Partnership as the surviving applicant are inconsistent with the public interest, convenience and necessity.[6]

12. Moreover, USCC has not shown that the dispute between Margaretville Telephone and USCC over rights that USCC may have in Margaretville Cellular adversely affects the qualifications of the tentative selectee. The alleged conduct of Margaretville Telephone in the exercise of any fiduciary duty owed to its partner in Margaretville Cellular is insufficient to raise a material issue against Catskills Partnership.[7] Margaretville Cellular holds only a minority limited partnership interest in the settlement applicant. Furthermore, a local state judicial forum is the proper place to resolve the dispute between USCC and Margaretville Telephone regarding any agreement between them and not before the FCC.[8] Finally, USCC has provided no basis for us to find that a grant of authorization should be conditioned on the outcome of such a court proceeding.

V. ORDERING CLAUSES

13. Accordingly, IT IS ORDERED That, the Petition to Set Aside Settlement Agreement or for Other Relief filed by United States Cellular Corporation IS DENIED.

14. IT IS FURTHER ORDERED, That the application of Catskills RSA Limited Partnership, File No. 10826-CL-P-563-B-89, IS GRANTED. Further, Catskills RSA Limited Partnership, is on notice that in the event current or future MSA/RSA licensees encounter interference from any service extension Catskills RSA Limited Partnership will have to change frequencies in those cells or reduce its 39 dBu contour to eliminate any interference due to an extension. Catskills RSA Limited Partnership is the name of the grantee.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Mobile Services Division
Common Carrier Bureau

FOOTNOTES

[1] Margaretville Cellular and other wireline carriers, which include Delhi Cellular Telephone, Inc., Deposit Telephone Company, Hancock Telephone Company, and Middleburgh Telephone Company, initially had an 11.11% limited partner interest in Catskills Partnership. NY Cellular was the general partner and had a 44.45% interest.

[2] *See* 47 C.F.R. Sections 1.103(b) and 1.106(f).

[3] 47 C.F.R. Section 1.106(a)(1).

[4] *See* 47 C.F.R. Section 1.823(b)(2). Pursuant to this section of the rules, petitions to deny may be filed only against the tentative selectee within 45 days of the Public Notice announcing the tentative selection.

[5] *See* 47 C.F.R. Section 1.4(b) of the rules.

[6] Pursuant to the Communications Act of 1934, as amended, (the Act), the petitioner against a Title III authorization, must make "specific allegations of fact sufficient to show . . . that a

grant of the applications would be prima facie inconsistent [with the public interest, convenience, and necessity]." 47 U.S.C. Section 309(d)(1).

[7] *See generally Ellis Thompson*, 3 FCC Rcd 3962, 3963 (Mob. Serv. Div. 1988), *affirmed* 4 FCC Rcd 2599 (Com. Car. Bur. 1989) (alleged misconduct of settlement members insufficient to raise material issue against applicant holding majority interest).

[8] The Commission has declined to interpret or enforce settlement agreements among cellular applicants. *See American Cellular Network Corporation of Nevada*, 2 FCC Rcd 4530 (1987); *Answer of Houston*, Mimeo No. 4362 (Com. Car. Bur. released May 8, 1986).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southwestern Bell Telephone Company's Petition for Waiver of Sections 36.361 and 36.503 of the Commission's Rules — AAD 90-1

ORDER

Adopted: November 2, 1990; Released: November 13, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. On March 16, 1990, Southwestern Bell Telephone Company (SWB) filed a petition for waiver of Sections 36.361[1] and 36.503[2] of the Commission's rules. These rules specify the procedures which a carrier must use to allocate its depreciation expense and reserve between the interstate and intrastate jurisdictions.[3] SWB states that the Oklahoma Corporation Commission (OCC) has frozen the intrastate allocation factors that the OCC applies to the portion of SWB's depreciation expense and reserve which is related to a certain reserve deficit, and that this action prevents SWB from recovering all of the depreciation expense that our rules assign to the intrastate jurisdiction. SWB requests that the Commission allow it to freeze the interstate allocation factors that apply to the depreciation expense and reserve related to the reserve deficit, thereby increasing the interstate allocation and enabling SWB to fully recover those costs affected by the OCC's action. For the reasons discussed below we deny SWB's petition.

2. Since its decision in Docket No. 20188,[4] the Commission has been carefully monitoring the depreciation reserves of the local exchange carriers (LECs) and taking appropriate action when problems are found to exist. In the course of the Commission's 1986 depreciation represcription proceeding, the Common Carrier Bureau determined that SWB had a $180 million reserve deficit in Oklahoma.[5] In 1988 the Commission adopted a uniform five-year amortization policy for the LECs nationwide.[6] Consistent with this policy, the Commission then prescribed a five-year amortization for SWB's Oklahoma facilities as well as for a number of other LECs.[7]

3. On September 20, 1989, the OCC issued a decision affecting SWB's recovery of the depreciation reserve deficit in the intrastate jurisdiction.[8] The OCC adopted a four-year amortization period, rather than the five-year period specified by the FCC for interstate purposes. More importantly, the OCC "froze" intrastate allocation factors at October 1986 levels, rather than employing current allocation factors which ultimately might result in attributing a greater portion of the depreciation reserve deficit to the intrastate jurisdiction and potentially might cause upward pressure on local telephone rates in Oklahoma. The OCC recommended that SWB apply for a waiver from the FCC seeking increased recovery from the interstate jurisdiction to recover any shortfall caused by the OCC's ruling. The OCC's decision is pending judicial review in the Supreme Court of Oklahoma.

II. PETITION AND COMMENTS

4. Against this backdrop, SWB petitions the Commission for a waiver of applicable Part 36 separations rules. SWB states that the OCC's ruling freezing the intrastate allocation factors applicable to the depreciation expense and reserve associated with its depreciation reserve deficit at 1986 levels frustrates the purpose of the Commission's Separations rules, which require that these costs be separated using the current related plant allocations. SWB states that under these rules monthly changes may occur in the depreciation expense and reserve allocation factors to reflect changes in customer usage, the introduction of new basic separations studies for the plant investment categories, and changes in the separations rules themselves. SWB further states that it is opposed to the OCC's freezing of the allocation factors, but that it must abide by the OCC order. Finally, SWB states that, absent a waiver from this Commission, SWB will not fully recover its investment.

5. In its comments, AT&T argues that SWB has not shown good cause for a waiver of the Part 36 rules and that the proper remedy lies with the OCC. AT&T indicates that SWB neither challenges the Commission's decision to implement the five-year amortization period nor presents any evidence to warrant a reversal of that finding as it applies to SWB. AT&T also argues that the OCC's action provides no basis for a waiver of the Commission's rules. According to AT&T, once the costs of service have been apportioned between interstate and intrastate jurisdictions, it is the prerogative of the relevant state commission to determine whether and how intrastate depreciation expense will be recovered from intrastate ratepayers. AT&T argues that if SWB's waiver were granted, state commissions could routinely and with impunity deny the LECs' recovery of intrastate depreciation costs, knowing that any disallowed intrastate amounts would be thrust upon interstate ratepayers. It concludes that this clearly would be contrary to the regulatory scheme established by the Communications Act.

6. In its reply, SWB argues that its inability to obtain the requested relief from the OCC forms the basis of its request for relief from the Commission, and as such, demonstrates good cause. SWB claims that if the OCC decision is affirmed on appeal, the only way it could recover its total revenue requirement is by obtaining this waiver. SWB emphasizes that the OCC recommended in its order that SWB should apply for a waiver from this Commission, and that the OCC's recommendation should form the basis for a showing of good cause as required by the Commission's rules.

III. DISCUSSION

7. *In WAIT Radio v. FCC*, the United States Court of Appeals stated that "a waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest."[9] In its petition SWB fails to provide any data or describe any special circumstances that warrant a waiver of the Commission's Part 36 rules concerning the jurisdictional al-

location of the depreciation reserve deficit. SWB's argument that if the OCC's decision is upheld on appeal, the only way it can recover its full revenue requirement is by obtaining this waiver is not a special circumstance that warrants the granting of a waiver. Moreover, SWB fails to indicate how a waiver of this rule would serve the public interest. Rather, it simply assumes that interstate ratepayers should be responsible for costs that are assigned to but not recovered from the intrastate jurisdiction.

8. SWB's problem in achieving full recovery is not caused by the application of the Commission's Part 36 separations rules or any Commission action. Rather, the possibility of shortfall is the direct result of the OCC's decision to employ allocation factors other than those prescribed by the Commission. SWB has challenged the OCC's order in state court; judicial review of the OCC's action, rather than waiver of valid Commission rules, is appropriate under these circumstances.[10] We therefore deny SWB's petition for waiver of Sections 36.361 and 36.503 of the Commission's rules.

IV. ORDERING CLAUSE

9. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. §154(i), That Southwestern Bell Telephone Company's petition for waiver of Sections 36.361 and 36.503 of the Commission's rules IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] 47 CFR §36.361 (1989).

[2] 47 CFR §36.503 (1989).

[3] According to these rules a carrier's depreciation expense and reserve are to be allocated between interstate and intrastate jurisdictions on the basis of its associated primary plant accounts. Under normal circumstances the jurisdictional separations factors for the depreciation expense and reserve change monthly as the separations factors for the primary plant accounts change and as the mix of investment in the primary plant accounts change.

[4] Amendment of Part 31 (Uniform System of Accounts for Class A and Class B Telephone Companies), Docket No. 20188, 83 FCC 2d 267 (1980), *reconsideration*, 87 FCC 2d 916 (1981), *Supplemental Opinion and Order*, 87 FCC 2d 1112 (1981).

[5] The Prescription of Revised Percentages of Depreciation Pursuant to the Communications Act of 1934, as amended, for: General Telephone Company of Florida, *et al.*, 2 FCC Rcd 610 (1987).

[6] Amortization of Depreciation Reserve Imbalances of Local Exchange Carriers, CC Docket No. 80-447, 3 FCC Rcd 984 (1988) (*Amortization Order*).

[7] The Prescription of Revised Percentages of Depreciation Pursuant to the Communications Act of 1934, as amended, for: General Telephone Company of Florida, *et al.*, 3 FCC Rcd 1216 (1988).

[8] *See* In the Matter of the Application of Howard W. Motley, Jr. for an Inquiry into the effect of the 1986 Tax Reform Act on Oklahoma Utilities, Cause No. PUD 000260, Order Regarding Rates of Southwestern Bell Telephone, Order No. 341630 (released September 20, 1989), *appeal pending sub nom.* American Association of Retired Persons v. OCC (Sup. Ct. Okla. Docket No. 74194), Southwestern Bell Telephone Co. Petition in Error filed October 30, 1989.

[9] WAIT Radio v. FCC, 418 F. 2d 1153, 1159 (D.C. Cir. 1969). *See also* Northeast Cellular Telephone Company, L.P. v. FCC, 897 F. 2d 1164 (D.C. Cir. 1990).

[10] Presumably, OCC's authority to require carriers to employ allocation procedures inconsistent with Part 36 of the Commission's rules is an issue SWB is pursuing in its court challenge to the OCC's order. *See, e.g.*, Hawaiian Telephone Company v. Public Utilities Commission of State of Hawaii, 827 F. 2d 1264 (9th Cir. 1987), *cert. denied*, 403 U.S. 923 (1988).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-934

In re Applications

COAST TV	File No. BPCT-840720KG
MISSION BROADCASTING CORPORATION	File No. BPCT-840723KI
SOLAR TELEVISION, INC.	File No. BPCT-840723KJ

For Construction Permit for a New
Television Station, Channel 38
Santa Barbara, California

MEMORANDUM OPINION AND ORDER

Adopted: November 2, 1990; Released: November 16, 1990

By the Review Board: MARINO (Chairman), BLUMENTHAL and ESBENSEN.

1. This proceeding involves the mutually exclusive applications of Coast TV (Coast), Mission Broadcasting Corporation (Mission), and Solar Television, Inc. (Solar) for authority to construct a new television station to operate on Channel 38 at Santa Barbara, California. In an *Initial Decision* (I.D.), 1 FCC Rcd 34 (1986), Administrative Law Judge Edward Luton (ALJ) granted the Coast application based solely on its qualitative enhancement advantages. After exceptions were filed, the Review Board issued a *Decision*, 2 FCC Rcd 2982 (Rev. Bd. 1987), reversing the ALJ's ultimate conclusion and finding that the Mission application was substantially preferred on the basis of its quantitative integration superiority. Unlike the ALJ, who had awarded all three applicants 100% quantitative integration credit, the Board held that Mission was entitled to at least 73.7%, but no more than 82.4%, quantitative integration credit, compared to at most 30.74% for Coast, and 0% for Solar. *Id.* at 2985.

2. On appeal, the Commission agreed with the Board that Coast's integration credit should be reduced because of the material involvement of its limited partners in the management of the applicant. *Coast TV*, 4 FCC Rcd 1786, 1788 (1989), (*Remand Order*), *modified and recon. dismissed*, 5 FCC Rcd 2751 (1990). The Commission, however, reversed the Board's holding that Solar had not adequately demonstrated the legitimacy of its corporate structure for the purpose of establishing integration credit, and found that Solar was entitled to 100%. *Id.* at 1788-1789. In light of this determination, the Commission remanded the proceeding to the Board: (a) because the Board did not consider all of the exceptions of Mission and Coast with respect to Solar's application; (b) because the Board did not specifically rule on the extent of the quantitative integration credit due Mission; and (c) the Board did not reach the qualitative enhancement factors of the applicants' proposals. *Id.*, at 1789. Finally, the Commission directed the Board to consider a November 7, 1988 Motion to Enlarge Issues, filed by Coast against Mission, alleging a violation of 47 C.F.R. §1.65, as well as any other decisionally significant matters. *Id.*

3. By letter of July 18, 1990, the Board directed the parties to supplement their previously filed pleadings so as to identify the decisionally significant issues that remain to be resolved. In response, Coast contends that the Board must examine Solar's financial qualifications, as raised in its motions of March 26 and April 22, 1985. In addition, it notes that, on March 20, 1989, it sought (for the second time) to enlarge the issues against Mission on character grounds. As to the comparative issue, Coast urges that the Board should revisit the issue of how much quantitative credit Coast is due. Mission agrees with Coast that financial certification and misrepresentation issues should be added against Solar. Under the comparative issue, Mission argues that the Board should now award it 100% integration credit and find that its qualitative enhancements are superior to those of Solar. For its part, Solar contends that its quantitative superiority over the other applicants makes irrelevant the qualitative differences. Solar also argues that the ALJ's rulings denying the financial issues were correct, but that any financial issue added against it would apply equally to Mission.

Comparative Issue

4. The comparative evaluation of the applicants in this case may be stated simply. By virtue of the Commission's *Remand Order*, Solar has been awarded 100% full-time integration credit. Coast, awarded only 30.74% quantitative integration credit in the Board's *Decision*, now argues for reevaluation and full credit. We disagree with Coast. The Commission's *Remand Order* cannot be read as an invitation to reconsider matters on which the Board has deliberated and been specifically affirmed. The *Remand Order* discussed Coast's application at length and concluded that "the Board properly reduced its integration credit." 4 FCC Rcd at 1786-1788. *See also Memorandum Opinion and Order*, 5 FCC Rcd 2751-2153, dismissing Coast's reconsideration petition. In view of the 100% vs. 30.74% disparity in their respective integration credits, Solar is entitled to a substantial integration preference over Coast. *See Family Broadcasting Group*, 93 FCC 2d 771, 778 (Rev. Bd. 1983) (100% vs. 46% full-time awarded substantial preference), *rev. denied*, FCC 83-559, released November 29, 1983.

5. We also disagree with Mission that the Board should now award its proposal 100% integration credit. To do so would be contrary to both the findings and conclusions already made in this case, as well as the Commission's *Remand Order* instructions. In our *Decision*, we adopted the ALJ's finding that Mission is a corporation consisting of six voting and twenty-five non-voting stockholders. In response to exceptions by Coast and Solar to the ALJ's award of 100% integration credit to Mission, we reviewed and credited the specific integration proposals of Mission principals Willie M. Rowan (35.3% voting stock), George G. Guzman (11.8% voting stock), Melvin B. Donalson (5.9% voting stock), and Floyd Little (29.4% voting stock), who was unchallenged, thus awarding Mission a total of 82.4% credit. Because this easily outweighed the 30.74% credit awarded Coast (and Solar's 0%), we held

that we need not dwell at length on the remaining exceptions challenging the proposals of Christopher P. Carrera (5.9% voting stock) and Payne K. Green (11.8% voting stock). We also held that we need not address the close question presented by the ALJ's findings as to whether former Mission voting stockholder, Joe DeLuna, resigned before the "B" cut-off date, because even if we agreed with the exceptions and further reduced Mission's credit by Mr. DeLuna's equity, it would still have sufficient overall integration credit (73.7%) to prevail over its competitors.

6. Contrary to Mission's suggestion, we did not fail to address the proposals of its principals Carrera and Green; we simply did not address them at length because Mission's overall integration credit, even without their inclusion, was superior. In fact, we specifically held as follows: "Regarding Messrs. Carrera and Green, we agree with Coast and Solar that, as revealed in their cross-examination (Tr. 684-685, 751-768, 901, 904-907, 915-923), their roles appear too vague and insufficiently managerial to receive ownership integration credit." 2 FCC Rcd at 2986, n. 5. Thus, we reaffirm that Carrera and Green receive no credit and Mission is entitled to no more than 82.4% credit. Mission's argument here gains nothing in repetition. *See WWIZ, Inc.*, 37 FCC 685 (1964), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F. 2d 824 (D.C. Cir. 1965). As a consequence of the Commission's restoration of Solar's 100% integration credit, it receives a slight but decisional integration preferance over Mission, which is entitled to at most 82.4% credit. *See Minority Broadcasters of East St. Louis, Inc.*, 99 FCC 2d 264 (Rev. Bd. 1984), *modified on other grounds*, 57 RR 2d 1390 (1985), (slight preference for 100% vs. 83.485% advantage), *aff'd sub nom. Spectrum Telecommunications Corp. v. FCC*, 786 F. 2d 432 (D.C. Cir. 1986); *Bradley, Hand & Triplett*, 89 FCC 2d 657 (Rev. Bd. 1982) (slight preference for 100% vs. 80% difference). Furthermore, even if we specifically affirm the ALJ's ruling regarding DeLuna's resignation, as Mission requests, it would still be entitled to no more than 82.4% credit, as opposed to 73.7%, if we interpret the facts adversely to Mission.

7. By the same reasoning, Mission's claims to qualitative integration superiority are unavailing, because qualitative attributes of participating owners can only enhance the value of an integration proposal but cannot overcome a clear quantitative difference. *Van Buren Community Service Broadcasters, Inc.*, 87 FCC 2d 1018 (Rev. Bd. 1981). The Commission has defined such a difference as 12.5% (1250 using Index, *see Omaha TV 15, Inc.*, 4 FCC Rcd 730, 734 (1988)), which is exceeded by the 17.6% (1760 using Index) difference here between Solar and Mission. *See Miracle Strip Communications, Inc.*, 4 FCC Rcd 5064, 5065-5066 (1989), *recon. denied*, 5 FCC Rcd 581 (1990); *New Continental Broadcasting Co.*, 88 FCC 2d 830, 850 (Rev. Bd. 1983) (subsequent history omitted). Nevertheless, in accordance with the Commission's apparent intention that, for purposes of completeness, we address the qualitative difference, we agree with Mission, that had the matter been decisional here, its history of local residence and record of civic participation is superior to Solar's, but that there are no other significant qualitative differences between them. *See I. D.*, 1 FCC Rcd at 43-44. On the basis of the Commission's ultimate instruction that we focus this remand on matters of decisional importance, however, *see* 4 FCC Rcd at 1789; *see also* 47 C.F.R. 1.282(b)(2), we conclude that Solar is the comparative winner because of its quantitative integration superiority.

Motions to Enlarge Issues

8. Both Coast and Mission sought financial certification issues against Solar, which were denied by the ALJ. *See Memorandum Opinion and Orders*, FCC 85M-2838, released July 18, 1985; and FCC 86M-942, released March 13, 1986. The gravamen of these matters is as follows. Solar originally filed its application on July 23, 1984 as an unincorporated association consisting of Eugene E. Huguez, Suzanne Manriquez and Kenneth E. Hinton d/b/a Mission Broadcast with each of the three individuals holding a one-third interest. Its application contained an affirmative certification of financial qualifications. By amendment of February 20, 1985, the three owners reconstituted the applicant as a corporation, with each owning equal shares of voting stock. Solar did not, however, recertify its financial qualifications, although its contemporaneous balance sheet showed assets of $510 and liabilities of $10,893.35. On the same date, Solar issued an Offering Memorandum by which it offered stock for sale to the public. In that document, it declared that "upon formation, the Company was insolvent because it assumed debts in excess of its assets." It also stated:

> The Company currently lacks capitalization and there is no assurance that its capitalization ever will be adequate to complete its application project. If successful at the application stage, the Company will need substantial additional funds to construct the station and operate it. The cost of borrowing and many other uncertainties will attend the raising of these funds, if they can be raised.

Coast March 25, 1985 Motion to Enlarge Issues (Att. A). Based on this information, Coast claimed that Solar's apparent insolvency called into question its previous certification. In response, Solar, supported by the affidavit of its principal Eugene Huguez, contended that all of its liabilities had been discharged; that since February 19, 1985, it had entered into loan agreements and secured lines of credit totaling $127,500 which would be used to meet costs of prosecuting the application; that "these are not the sources that are being relied on for the funds that will be necessary to construct and operate the station . . . "; and that "Coast has no knowledge of the basis for Solar's Section III certification." Opposition to Motion to Enlarge (Att. C), filed April 15, 1985. The ALJ ruled that the language of the Offering Memorandum suggested only that Solar lacked cash-on-hand, but did not establish, as alleged, that it had made no provision for loans or credit with which to finance its proposal. FCC 85M-2838, *supra* (para. 4). The ALJ later summarily rejected Mission's February 5, 1986 Motion to Enlarge, insofar as it argued that the hearing testimony of Solar principal Eugene Huguez confirmed that its financial certification was false. FCC 86M-942, *supra* (para. 7 n. 1).

9. We believe a serious question has been raised as to whether at the time of the original application filing, Solar's organizational predecessor association (comprised of its three current stockholders) was in a position to make a good faith certification of its financial wherewithal. As we have had frequent occasion to explain, following the adoption of the certification procedures,

Revision of Form 301, 50 RR 2d 381 (1981), applicants must demonstrate that they possessed reasonable assurance of funding when they certified, either in the form of net liquid assets on hand or from other committed sources, so as to enable them to construct and operate for three months without reliance on revenues. *Northampton Media Associates*, 4 FCC Rcd 5517, 5518-19 (1989). "In other words, the applicant may not certify its financial qualifications and then arrange financing." *Id.*, at 5518, citing *Pepper Schultz*, 103 FCC 2d 1052, 1058-1059 (Rev. Bd. 1986)(subsequent history omitted).

10. In our view, a *prima facie* question was presented to the ALJ regarding Solar's financial certification because of its 1985 quest for additional investors to fund prosecution of its application. Solar's Offering Memorandum conceded not only that the applicant was currently insolvent and lacked capitalization, but also that "the Company will need substantial additional funds to construct the station and operate it." Moreover, at the hearing, Huguez confirmed Solar's need for financial support (Tr. 1580-1581):

> Q: Mr. Huguez, the question was why did you want investors at that point?
>
> A: Well, I believed it was important to have investors.
>
> Q: Why was it important?
>
> A: In a way that having investors brought into our Corporation, we felt that we would have support.
>
> Q: What type of support?
>
> A: Well, we were looking for community support--
>
> Q: Why did you need investors for community support?
>
> A: -- and financial support.
>
> Q: And your decision to have two classes of stock was an attempt to get some more financial support; is that what you're saying?
>
> A: Yes.

11. While we have no reason to doubt the Huguez affidavit that Solar had not defaulted on any debt, or that it obtained loans to meet its prosecution expenses, this provides at best assurance only that Solar took steps after incorporation, and well after certification, to meet only one element of its financial qualifications. *Cf. Port Huron Family Radio, Inc.*, 5 FCC Rcd 4562, 4563 (1990). Albeit Solar is correct that movants, under 47 C.F.R. 1.229, must state sufficient facts to raise a *prima facie* question, we believe that standard was met here and the burden shifted to Solar to dispel any doubts as to its certification. *See Citizens for Jazz on WRVR v. FCC*, 775 F.2d 392, 397 (D.C. Cir. 1985). In view of the Commission's expectation that applicants "adduce probative evidence" to establish reasonable assurance, including "something more than the self-serving, uncorroborated statement of the individual responsible for the certification that he had taken steps to secure the needed funds," *Northampton*, 4 FCC Rcd at 5518-19, we cannot accept, without further explanation, Solar's general statement that it "has repeatedly declared under oath that it took the required steps." Solar Reply at 3, filed August 6, 1990. Nor is it sufficient, as Solar now reveals, that: "Solar's current financial plan includes reliance on a bank letter (a fact here disclosed for the first time) . . . . Solar's letter . . . was issued on the strength of an independent, financially able third party's helpful representations to the bank. All of this is disclosed here for the first time." *Id.* at 4. Short of additional hearing, we cannot evaluate this claim or answer the operative question as to the validity of Solar's original certification. *See Charisma Broadcasting Corp.*, 5 FCC Rcd 561 (Rev. Bd. 1990); *Shawn Phelan*, 5 FCC Rcd 53 (Rev. Bd. 1990).

12. Insofar as Solar argues that any financial issue added against it must also apply to Mission, we point out that the Commission's *Remand Order*, directed only that we review Mission's basic qualifications to the extent of considering Coast's recent allegations of reporting violations. In light of our remand, however, and in order to preclude the possibility that similarly situated applicants could be afforded disparate treatment, we will authorize the ALJ to revisit the matter and decide whether the issues should be enlarged against Mission as well. *See Albert E. Gary, supra*, at para. 12. Finally, with regard to the other issues raised against Solar in the prehearing motions of its opponents, and preserved in their exceptions, we agree with the ALJ's reasons for denying those requests.

13. The Commission's *Remand Order* further directed consideration of Coast's November 7, 1988 Motion to Enlarge Issues against Mission. Therein, Coast alleged that Mission violated the reporting requirements of 47 C.F.R. §1.65 by not reporting that, on September 8, 1988, the Santa Barbara District Attorney filed a complaint charging Mission principal Payne K. Green with a felony -- solicitation of perjury. Based on Mission's subsequent Petition for Leave to Amend reporting that Mr. Green had been convicted in Santa Barbara Superior Court of the felony count and two misdemeanor counts, Coast further moved to enlarge the issues on March 20, 1989 to add a character qualification issue. Thereafter, in a Petition for Leave to Amend filed June 20, 1989, Mission reported that Superior Court Judge Ronald C. Stevens had ordered a new trial for Green, and set a settlement conference for June 16, 1989. On August 22, 1989, Mission submitted a further amendment reporting that, on August 11, 1989, Green pled no contest to a misdemeanor count (drawing or exhibiting a firearm), and that the other two counts, including the felony charge, were dismissed. Green was sentenced to two years probation.

14. We will not add the requested issues. In its *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986), *recon. granted in part, denied in part*, 1 FCC Rcd 421 (1986), *appeal dismissed sub nom. National Association for Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. June 11, 1987), the Commission stated its concern with "misconduct which demonstrates the proclivity of an applicant or licensee to deal truthfully with the Commission and to comply with our rules and policies." 102 FCC 2d at 1190-91. The Commission there held that it would consider only adjudications involving

fraudulent representations to government bodies, criminal misconduct involving false statements or dishonesty, and broadcast-related antitrust violations. *Id.* at 1195-97, 1200-1203. In a modification of its policies, *Policy Regarding Character Qualifications in Broadcast Licensing*, 5 FCC Rcd 3252 (1990), the Commission broadened its approach to consider any conviction for misconduct constituting a felony, and further noted that it "retain[ed] the discretion to consider serious misdemeanor convictions in appropriate or compelling cases, particularly where there is a pattern of such convictions." *Id.* at 3252, 3254 n. 3. While the original felony charge of solicitation of perjury would appear to satisfy the Commission's test of criminal misconduct involving false statements or dishonesty, that count has now been dismissed (apparently in exchange for a no contest plea on a misdemeanor charge). With regard to the latter charge, there is no evidence before us that this incident was part of a pattern of criminal behavior. Moreover, there is no Commission precedent yet on what constitutes "appropriate or compelling" circumstances requiring further examination. Though Green has pleaded no contest to a serious misdemeanor, we will refrain from further action in this case of first impression, pending future Commission guidance. As to Mission's initial failure to timely report the filing of criminal charges against Green, Coast has not made a *prima facie* showing of a pattern of repeated violations or other significant carelessness or inattention, deliberate concealment, or present decisional significance. *See Merrimack Valley Broadcasting, Inc.*,99 FCC 2d 680, 683 n. 9 (1984).

15. ACCORDINGLY, IT IS ORDERED, That this proceeding IS REMANDED to the presiding judge for further hearing and the preparation of a Supplemental Initial Decision on the following issues:

To determine whether Solar Television, Inc. is financially qualified to be a Commission licensee; and

To determine whether Solar Television, Inc. falsely certified its financial qualifications and, if so, the effect thereof on its qualifications to be a Commission licensee.

16. IT IS FURTHER ORDERED, That the motions to enlarge issues filed November 7, 1988 and March 20, 1989 by Coast TV ARE DENIED; that the petitions for leave to amend filed March 8, 1989, June 20, 1989, August 22, 1989, April 13, 1990 and October 16, 1990 by Mission Broadcasting Corporation ARE GRANTED and the amendments ARE ACCEPTED; and that the motion to hold in abeyance filed March 28, 1989 by Mission Broadcasting Corporation IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 88-568

In re Applications of

EDUCATIONAL BROADCASTING CORP. File No. BPED-871216MB

For Construction Permit for a
new FM Station on Channel 264A
in Claremore, Oklahoma

Appearances

Stephen C. Simpson, Esquire, on behalf of Educational Broadcasting Corp., and *Norman L. Goldstein, Esquire*, and *Jerry M. Hermele, Esquire*, on behalf of the Chief, Mass Media Bureau, Federal Communications Commission.

SUMMARY DECISION OF CHIEF ADMINISTRATIVE LAW JUDGE JOSEPH STIRMER

Issued: November 7, 1990; Released: November 15, 1990

PRELIMINARY STATEMENT

1. This proceeding was designated for hearing by *Hearing Designation Order* (DA 88-1853), released January 17, 1989.[1] Originally, four applications were designated for hearing. However, the application of Fred M. Weinberg was dismissed by *Order* of the Presiding Judge, FCC 89M-774, released March 13, 1989. Thereafter, the three remaining applicants entered into a settlement agreement pursuant to which the applications of Mary Karen Dodd and Pamela Kay Warren were dismissed. (*See, Memorandum Opinion and Order* of the Presiding Judge, FCC 90M-3472, released November 2, 1990.) Thus, the sole remaining applicant is that of Educational Broadcasting Corp. (EBC).

2. Presently before the Presiding Judge is a "Motion for Summary Decision" filed by EBC on August 1, 1990. This motion, which was supplemented on September 17, 1990, and September 21, 1990, seeks summary decision on the following issue which was specified by the Presiding Judge in *Memorandum Opinion and Order*, FCC 90M-1373, released May 30, 1990:

> To determine whether any of the applicants [EBC] are financially qualified to build and operate their proposed station, whether the financial certification executed by each was accurate and truthful at the time of certification, and based on the evidence adduced thereunder, which, if any, of the applicants is basically qualified to be a Commission licensee.

The Mass Media Bureau, in a filing dated October 2, 1990, supports EBC's request for summary decision.

FINDINGS OF FACT

3. EBC is an entity formed by the Eastland Baptist Church, Tulsa, Oklahoma, to own and operate an FM facility. The principals of EBC are identical to its parent church. Prior to filing the application, EBC ascertained that construction and operation expenses for the first three months would total $125,000. These estimates were obtained from David P. Woodworth, Assistant Administrator, Network Development for the Moody Broadcasting Network. More specifically, William Field, a board member of EBC, had several discussions with Mr. Woodworth and received a letter from him containing cost estimates and start-up costs for another FM station with which he was familiar. The cost estimates ascertained by Mr. Field were discussed with David W. Hardy, the Pastor and Director of Eastland Baptist Church, who agreed that the Church will totally fund the project. In this connection, the church had been attempting to secure an FM station since 1981 and created EBC and agreed to provide the necessary funding to build and operate the proposed FM station. The funds were to be provided as a "no interest" loan with the principal to be repaid at an unspecified date. More recently, EBC has secured a current proposal for a "turnkey" package from Harris Corporation in an amount totaling $150,936.60.

4. At the time the EBC application was filed and the applicant certified that it was financially qualified, the applicant was relying on funds from the Eastland Baptist Church to meet its estimated construction and operation costs of $125,000. It has been shown that at the time of certification, the church had available liquid assets of $134,817.67 to meet estimated costs. By April 1989, the church had available cash on hand in the bank of approximately $400,000. In addition, at the time of certification, the church had substantial non-liquid assets available and currently has non-liquid assets totaling several million dollars. The Eastland Baptist Church has always been committed to funding EBC's quest for an FM station. It had the ability to do so at the time the application was filed in 1987, and Eastland Baptist Church remains able to do so now.

CONCLUSIONS OF LAW

5. A broadcast applicant must have reasonable assurance of having sufficient funds to construct and operate without revenue for three months before the applicant certifies its financial qualifications. In order to prove reasonable assurance at time of certification, the applicant must adduce probative evidence that, prior to certification, it engaged in serious and reasonable efforts to ascertain predictable construction and operation costs. To establish the availability of funds to meet these estimated expenses, the applicant must provide substantial and reliable evidence showing sufficient net liquid assets on hand or committed sources of funds to construct and operate for three months without revenue. *Rebecca L. Boedker*, 5 FCC Rcd 2855 (1990).

6. When EBC certified that it was financially qualified, it had made a reasonable effort to ascertain its projected costs and had available sufficient net liquid assets from committed sources to construct and operate its proposed

station for three months without revenue.[2] *Northampton Media Associates*, 4 FCC Rcd 5517 (1989). Thus, EBC was financially qualified when it filed its application, and there was no irregularity in EBC's financial certification. Moreover, in addition to demonstrating that it was financially qualified to construct and operate its proposed station at the time it filed its application, EBC has shown that it remains financially qualified today.

7. Section 1.251 of the Commission's rules provides for summary decision where there is no genuine issue of material fact for determination at hearing. *New Broadcasting Corp.*, 44 FCC 2d 386 (1973). Based on the balance sheets and declarations submitted by EBC, the applicant is entitled to summary decision under the financial issue. Accordingly IT IS ORDERED that the unopposed "Motion for Summary Decision" filed by Educational Broadcasting Corp. on August 1, 1990, and supplemented on September 17 and September 21, 1990, IS GRANTED, and the financial issue IS RESOLVED in favor of the applicant; IT IS FURTHER ORDERED that the application of Educational Broadcasting Corp. (File No. BPED-871216MB) for a construction permit for a new FM station on Channel 264A in Claremore, Oklahoma, IS GRANTED. [3]

FEDERAL COMMUNICATIONS COMMISSION

Joseph Stirmer
Chief Administrative Law Judge

FOOTNOTES

[1] Applications were initially filed specifying Channel 233A, but the *Hearing Designation Order* directed the applicants to amend their applications to specify Channel 264A.

[2] In addition, Eastland Baptist Church had available substantial non-liquid assets. It has been held that non-liquid assets totaling several times estimated costs would render an applicant financially qualified. *Kaye - Smith Enterprises*, 98 FCC 2d 675 (1984).

[3] In the event that exceptions are not filed within 30 days after the release of this Summary Decision, and the Commission does not review the case on its own motion, this Summary Decision shall become effective 50 days after its public release pursuant to 48 C.F.R. 1.276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 89-581

In the Matter of

Amendment of Section 73.202(b), RM-7067
Table of Allotments,
FM Broadcast Stations.
(Zanesville and South Zanesville,
Ohio)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 31, 1990; Released: November 16, 1990

By the Assistant Chief, Policy and Rules Division:

1. At the request of Christian Voice of Central Ohio ("petitioner"), licensee of Station WCVZ(FM), Zanesville, Ohio, the Commission has before it the *Notice of Proposed Rule Making*, 4 FCC Rcd 8702 (1989), proposing the substitution of Channel 224B1 for Channel 224A, the reallotment of Channel 224B1 to South Zanesville, Ohio, as that community's first local FM service, and the modification of its license for Station WCVZ(FM) to specify operation on the higher powered channel. Petitioner filed comments reiterating its intention to apply for Channel 224B1, if allotted to South Zanesville. No other comments were received.

2. We believe the public interest would be served by substituting Channel 224B1 for Channel 224A and reallotting the channel from Zanesville to South Zanesville. Petitioner has demonstrated that the reallotment of Channel 224B1 to South Zanesville would result in a preferential arrangement of allotments, as that community would receive its first local FM service. Further, the reallotment would enable Station WCVZ(FM) to serve a larger area and population than is now possible because there is no higher powered channel available for allotment to Zanesville. This action will not deprive Zanesville of its only local aural transmission service, as Stations WHIZ-AM and FM are licensed to Zanesville. As proposed, we will also modify petitioner's license for Station WCVZ(FM) to specify Channel 224B1 in lieu of its present Channel 224A and South Zanesville, Ohio, as its community of license.

3. Channel 224B1 can be allotted to South Zanesville in compliance with the Commission's minimum distance separation requirements with a site restriction of 21.1 kilometers (13.1 miles) south of the community to avoid a short-spacing to Stations WDJQ, Channel 223B, Alliance, Ohio, and WQEL, Channel 224A, Bucyrus, Ohio.[1] Canadian concurrence in the allotment has been received since South Zanesville is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 31, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
South Zanesville, Ohio	224B1
Zanesville, Ohio	273B

5. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of Christian Voice of Central Ohio, for Station WCVZ(FM), IS MODIFIED to specify South Zanesville, Ohio, in lieu of Zanesville, Ohio, as its community of license, and specify operation on Channel 224B1, in lieu of Channel 224A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 224B1 at South Zanesville are North Latitude 39-42-53 and West Longitude 82-04-02. Since the allotment is made as a result of a petition for rule making filed prior to October 2, 1989, the licensee may avail itself of the provisions of Section 73.213(c)(1) of the Commission's Rules. *See* 47 C.F.R. §73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-546

In the Matter of

Amendment of Section 73.202(b),	RM-7526
Table of Allotments,	
FM Broadcast Stations.	
(Live Oak, Florida)	

NOTICE OF PROPOSED RULE MAKING

Adopted: October 31, 1990; Released: November 16, 1990

By the Assistant Chief, Policy and Rules Division:

1. Day Communications, Inc. ("petitioner"), licensee of Station WQHL(FM), Channel 251C2, Live Oak, Florida, has filed a petition for rule making requesting the substitution of Channel 251C1 for Channel 251C2 at Live Oak, Florida, and modification of its license for Station WQHL(FM) to specify the higher class channel. Petitioner states its intention to apply for the channel, if allotted.

2. We believe it would be in the public interest to consider petitioner's proposal because it could provide Live Oak with a wider coverage area FM service. An engineering analysis indicates that Channel 251C1 can be substituted for Channel 251C2 at Live Oak in compliance with the Commission's minimum distance separation requirements with a site restriction of 23.5 kilometers (14.6 miles) southwest,[1] in order to avoid a short-spacing to a construction permit for Station WUVU-FM, Channel 250C2, St. Augustine, Florida, and a pending proposal to allot Channel 254A to Statenville, Georgia. *See* MM Docket No. 90-214, 5 FCC Rcd 2685 (1990).

3. As requested, we shall also propose to modify the license of Station WQHL(FM) to specify operation on the higher class channel. In accordance with Section 1.420(g) of the Commission's Rules, we shall not accept competing expressions of interest in use of the higher powered channel at Live Oak or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such interested parties.

4. In view of the above the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Live Oak, Florida	251C2, 291A	251C1, 291A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 7, 1991,** and reply comments on or before **January 22, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

John F. Garziglia
Howard J. Barr
Pepper & Corazzini
200 Montgomery Building
1776 K Street, N.W.
Washington, D.C.
(Attorney for petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 251C1 at Live Oak are North Latitude 30-07-02 and West Longitude 83-07-29.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-547

In the Matter of

Amendment of Section 73.202(b), RM-7477
Table of Allotments,
FM Broadcast Stations.
(Claude, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 31, 1990; Released: November 16, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it a petition for rule making filed by Lucille Anne Lacy ("petitioner"), permittee of newly allotted Channel 239A, Claude, Texas, requesting the substitution of Channel 239C3 for Channel 239A at Claude and the modification of her construction permit (BPH-900108NC) accordingly. Petitioner affirms that she will file an application to modify her construction permit to specify operation on Channel 239C3, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 239C3 to Claude, Texas since it could provide the community with a wide coverage area FM service. A Commission engineering analysis confirms that Channel 239C3 can be allotted to Claude in compliance with the Commission's minimum distance separation requirements at the site specified in petitioner's construction permit.[1] We also propose to modify petitioner's construction permit to specify the higher class channel. In accordance with Section 1.420(g) of the Commission's Rules, we will not require petitioner to demonstrate the availability of an additional equivalent class channel or permit competing expressions of interest for the use of Channel 239A at Claude.

3. Accordingly, for the reasons stated above, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Claude, Texas	239A	239C3

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **Janaury 7, 1991,** and reply comments on or before **January 22, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

James K. Edmundson
Gardner, Carton & Douglas
Suite 750N
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
(Counsel for Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73. 504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Fawn E. Wilderson, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the

Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 239C3 at Claude are 35-06-34 and 101-21-23.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-548

In the Matter of

Amendment of Section 73.202(b), RM-7458
Table of Allotments,
FM Broadcast Stations.
(Centerville, Utah)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 31, 1990; Released: November 16, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it the petition for rule making filed by Radio Property Ventures ("petitioner") requesting the substitution of Channel 289C for Channel 289C1 at Centerville, Utah, and the modification of its construction permit for Station KBCK(FM) to specify operation on the higher powered channel. Petitioner states that it will apply for Channel 289C, if allotted.

2. We believe the public interest would be served by proposing the substitution of Channel 289C for Channel 289C1 at Centerville, Utah, since it could enable Station KBCK(FM) to expand its coverage area. Channel 289C can be allotted to Centerville in compliance with the Commission's minimum distance separation requirements.[1] As requested, we also propose to modify petitioner's construction permit to specify operation on Channel 289C. In accordance with Section 1.420(g) of the Commission's Rules, we will not accept competing expressions of interest for use of Channel 289C at Centerville, Utah, or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. Accordingly, the Commission believes it would be in the public interest to solicit comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

	Channel No.	
City	Present	Proposed
Centerville, Utah	289C1	289C

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 7, 1991,** and reply comments on or before **January 22, 1991**and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Howard J. Braun
Shelley Sadowsky
Rosenman & Colin
1300 19th Street, N.W.
Suite 200
Washington, D.C. 20036
(Counsel for Radio Property
Ventures)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Andrew J. Rhodes, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 289C at Centerville are North Latitude 40-42-28 and West Longitude 112-07-56.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-549

In the Matter of

Amendment of Section 73.202(b),	RM-7464
Table of Allotments,	
FM Broadcast Stations.	
(Joshua Tree, California)	

NOTICE OF PROPOSED RULE MAKING

Adopted: October 30, 1990; Released: November 16, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission considers herein a petition for rule making filed by Mel Yarmat ("petitioner") seeking the allotment of FM Channel 221A to Joshua Tree, California, as that community's first local broadcast service. Petitioner stated a willingness to apply for the channel, if allotted.

2. A staff engineering review of the proposal reveals that Channel 221A can be allotted to Joshua Tree consistent with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is located at least 4.3 kilometers (2.7 miles) east[1] to avoid a short-spacing to Station KVCR(FM), Channel 220B1, San Bernardino, California.[2] However, since Joshua Tree is located within 320 kilometers (199 miles) of the Mexican border, the Commission must obtain the concurrence of Mexico in the proposal.

3. We believe the public interest would be served by proposing the allotment of Channel 221A to Joshua Tree, California, since an interest has been expressed in providing that community with its first local broadcast service. Accordingly, we will seek comments on the proposed amendment to the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to Joshua Tree, as follows:

	Channel No.	
City	Present	Proposed
Joshua Tree, California	–	221A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 7, 1991,** and reply comments on or before **January 22, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, as follows:

Mel Yarmat
19519 Shasta Road
Apple Valley, CA 92307

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Coordinates used for Channel 221A at Joshua Tree are 34-08-45 and 116-16-04.

[2] Coordinates at the licensed site of Station KVCR(FM) are 33-57-57 and 117-17-05.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-335

In the Matter of

Amendment of Section 73.202(b), RM-7056
Table of Allotments,
FM Broadcast Stations.
(De Witt and England, Arkansas)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 30, 1990; Released: November 16, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 5 FCC Rcd 4554 (1990), issued in response to a joint petition filed on behalf of Diamond State Broadcasting, Inc. ("Diamond"), licensee of Station KLRA-FM,[1] Channel 243A, England, Arkansas, and Quadras, Inc. ("Quadras"), licensee of Station KDEW-FM,[2] Channel 244A, De Witt, Arkansas. [3] The *Notice* proposed the substitution of Channel 243C3 for Channel 243A at England and modification of the license of Station KLRA-FM to specify the higher powered channel, as well as the substitution of Channel 247C2 for Channel 244A at De Witt, Arkansas, and modification of the license of Station KDEW-FM, as requested by the petitioners. Petitioners filed supporting comments. No other comments were received.

2. As stated in the *Notice*, Channel 243C3 can be allotted to England, Arkansas, at the petitioner's suggested site, located 15.3 kilometers (9.5 miles) west[4] of the community. The restricted site avoids a short-spacing to Station KBHS-FM, Channel 244A, Hot Springs, Arkansas,[5] and vacant but applied for Channel 245A at Maumelle, Arkansas.[6] Channel 247C2 can be allotted to De Witt consistent with the minimum distance separation requirements of the Commission's rules, provided the transmitter is located at least 12.7 kilometers (7.9 miles) southwest[7] of the community. The site restriction avoids a short-spacing to Station KQUS-FM, Channel 248C1, Hot Springs, Arkansas,[8] as well as a proposal to allot Channel 247A at Bastrop, Louisiana, in MM Docket No. 89-85.[9] Moreover, we have determined that, in light of the common ownership of the England and De Witt stations, the modification requests would not result in a violation of the Commission's radio "duopoly" rules.[10]

3. In consideration of the above, we believe the public interest would be served by substituting Channel 243C3 for Channel 243A at England, Arkansas, as well as by substituting Channel 247C2 for Channel 244A at De Witt, Arkansas, since an expanded coverage area FM service would be provided to each community. In accordance with the provisions of Section 1.420(g) of the Commission's Rules, we are modifying herein the petitioners' licenses for Station KLRA-FM at England and Station KDEW-FM at De Witt, to specify operation on Channel 243C3 and Channel 247C2 respectively, as requested.[11]

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 31, 1990,** the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to the communities listed below, as follows:

City	Channel No.
De Witt, Arkansas	247C2
England, Arkansas	243C3

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the licenses issued to Diamond State Broadcasting, Inc. for Station KLRA-FM, England, Arkansas, and to Quadras, Inc. for Station KDEW-FM, De Witt, Arkansas, ARE MODIFIED effective **December 31, 1990,** to specify operation on Channel 243C3 in lieu of Channel 243A, and Channel 247C2 in lieu of Channel 244A, respectively, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensees shall submit to the Commission minor change applications for construction permits (Form 301), specifying the new facilities;

(b) Upon grant of the construction permits, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter locations or to avoid the necessity of filing environmental impact statements pursuant to Section 1.1301 of the Commission's Rules.

6. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

7. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTES

[1] Diamond is also the licensee of Station KLRA-AM, England, Arkansas.

[2] Quadras is also the licensee of Station KDEW-AM, De Witt, Arkansas.

[3] The England and De Witt AM and FM facilities are commonly owned. Therefore, the proponents are identified herein as "petitioners."

[4] Coordinates used for Channel 243C3 at England, Arkansas, are 34-30-58 and 92-07-45.

[5] Coordinates at the licensed site of Station KBHS-FM at Hot Springs are 34-32-01 and 93-03-24.

[6] Coordinates for Channel 245A at Maumelle are 34-51-43 and 92-24-12; coordinates at the site specified in the application for the channel (File No. BPH-871109MG) are 34-49-48 and 92-22-42.

[7] Coordinates used for Channel 247C2 at De Witt, Arkansas, are 34-12-20 and 91-25-18.

[8] Coordinates at the licensed site of Station KQUS-FM are 34-24-11 and 93-07-13.

[9] Coordinates used for proposed Channel 247A at Bastrop are 32-46-48 and 91-54-48.

[10] The Commission's radio "duopoly" rule prohibits the common ownership of two or more commercial FM stations whose predicted 3.16 mV/m contours overlap. *See* 47 CFR § 73.3555(a). Using the respective transmitter sites, a staff analysis of the proposals determined that the distance between the two proposals is 73.6 kilometers (45.7 miles), whereas a distance of 55.8 kilometers (34.7 miles) is required between the commonly-owned Class C2 and Class C3 stations to avoid an overlap of the 70 dBu contours.

[11] Because these allotments are made as a result of a petition for rule making filed prior to October 2, 1989, the licensees may avail themselves of the provisions of Section 73.213(c) of the Commission's Rules. *See* 47 CFR § 73.213(c).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-14

In the Matter of

Amendment of Section 73.202(b), RM-7193
Table of Allotments,
FM Broadcast Stations.
(Eldorado and Lawton, Oklahoma)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 29, 1990; Released: November 14, 1990

By the Assistant Chief, Policy and Rules Division:

1. At the request of Communicorp, Inc. (petitioner), licensee of Station KQLI(FM), Channel 232A, Lawton, Oklahoma, the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 618 (1990), proposing the substitution of Channel 246A for unoccupied and unapplied for Channel 232A at Eldorado, Oklahoma. Petitioner requests the substitution of channels at Eldorado so that it can upgrade Station KQLI(FM) from its present power of 3 kW to 6 kW. Petitioner filed comments reiterating its intention to apply for an increase in power to 6 kW if Channel 246A is allotted to Eldorado. No other comments were received.

2. Petitioner alternatively proposed in its petition for rule making that Station KQLI(FM) be upgraded by substituting Channel 232C3 for Channel 232A at Lawton. The Commission stated in the *Notice* that Channel 232C3 could not be allotted to Lawton in compliance with the Commission's minimum distance separation requirements because of short-spacings to Station KSEY(FM), Seymour, Texas, Station KDGE(FM), Gainesville, Texas, and Station KICZ(FM), Elk City, Oklahoma. Even though we recognized that the construction permit for Station KICZ(FM) had expired, we stated that a Channel 232C3 allotment at Lawton would still be required to protect the Elk City allotment since no request to delete the channel had been included in petitioner's proposal. In its comments, petitioner counterproposes the allotment of Channel 232C3 to Lawton by deleting Channel 232A at Elk City, stating that the channel has remained unused since the expiration of Station KICZ(FM)'s construction permit.

3. We believe the public interest would be served by substituting Channel 246A for unoccupied and unapplied for Channel 232A at Eldorado, Oklahoma, since it could enable Lawton to receive a 6 kW Class A allotment. Channel 246A can be allotted to Eldorado in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1] We will not, however, consider petitioner's counterproposal to substitute Channel 232C3 for Channel 232A at Lawton. Petitioner failed to submit any technical showing demonstrating that its proposed allotment of Channel 232C3 at Lawton complies with the Commission's minimum distance separation requirements. As the Commission has previously stated, counterproposals must be technically correct and substantially complete when filed in order to afford all parties an opportunity to fully respond in reply comments. *See Springdale, Arkansas, et al.*, 4 FCC Rcd 674 (1988), *recon. denied*, 5 FCC Rcd 1241 (1990); *Rockport, Texas, et al.*, 4 FCC Rcd 8075 (1989); and *Broken Arrow, Oklahoma*, 3 FCC Rcd 6507 (1988).

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 31, 1990**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Eldorado, Oklahoma	246A

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 246A at Eldorado are North Latitude 34-28-24 and West Longitude 99-38-54.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re
Applications for renewal
of License of Certain
Broadcast Stations
Serving Melbourne, Florida
and Other Communities in the
Florida Area

MEMORANDUM OPINION AND ORDER AND NOTICE OF APPARENT LIABILITY

Adopted: June 22, 1990; Released: November 6, 1990

By the Commission: Commissioner Quello concurring in part and dissenting in part and issuing a statement; Commissioner Duggan concurring and issuing a statement.

1. In connection with the renewal applications listed at note 2, *infra*, the Commission has before it (i) a Petition to Deny filed by the Florida State Conference of Branches of the NAACP and the National Black Media Coalition (NAACP/NBMC); (ii) oppositions filed by the licensees; (iii) the petitioners' reply comments; and (iv) the licensees' responses to inquiries made by the Commission staff.[1] NAACP/NBMC allege that the challenged stations violated the Commission's EEO rules and policies. Accordingly, they request that we investigate the stations' employment practices and designate the renewal applications for hearing. This Memorandum Opinion and Order and Notice of Apparent Liability (Order) will discuss petitioners' allegations regarding some of the petitioned stations.[2]

2. *PROCEDURAL MATTERS*. In challenging an application pursuant to Section 309 (d) of the Communications Act, a petitioner must demonstrate party in interest status. In addition, a petitioner must, as a threshold matter, submit "specific allegations of fact sufficient to show... that a grant of the application would be prima facie inconsistent with (the public interest, convenience, and necessity)." 47 U.S.C. Section 309 (d)(1); *Astroline Communications Co. v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988); *Dubuque T. V. Limitied Partnership*, 4 FCC Rcd 1999 (1989). The allegations, except for those of which official notice may be taken, must be supported by the affidavit of a person with a personal knowledge of the facts alleged. 47 U.S.C. Section 309 (d)(1).

3. The licensees of WCOA/WJLQ and WMMB/WGGD assert that the petitioners have not established standing because they failed to file supporting affidavits against the stations. Subsequent to the licensees' opposition, petitioners submitted a late-filed supporting statement from a member of the NAACP who resides in the WCOA/WJLQ listening area and a member of the NAACP who resides in the WMMB/WGGD listening area. As we stated in *Application of Certain Broadcast Radio Stations Serving Communities in the State of Florida*, 3 FCC Rcd 1930 (1988), we will not acquiesce to the petitioners' habit of submitting late filings for nonsubstantial reasons. Accordingly, pursuant to Section 73.3584 (b) of the Commission's Rules, 47 C.F.R. Section 73.3584 (b), NAACP will be considered an informal objector in its challenge against WCOA/WJLQ and WMMB/WGGD.

4. With respect to NBMC, we note that NBMC timely submitted a statement from Pluria Marshall, Chairman of the NBMC, and a resident of the Washington, D.C. metropolitan area. However, the Commission has previously held that a statement of Mr. Pluria Marshall, who is a member of NBMC but does not claim to be a listener of the stations nor a resident of the service areas of the challenged stations, does not satisfy the requirement of the Act. *See Michigan / Ohio Broadcast Renewals*, 3 FCC Rcd 6944 (1988); *see also KDEN Broadcasting Co.*, 55 Rad. Reg. 2d (P&F) 1311, 1311-1312 (1984). Accordingly, we hold that NBMC lacks standing to petition any of the stations in question and that we will treat its petition as an informal objection.

5. *DISCUSSION*. Section 73.2080 of the Commission's Rules, 47 C.F.R. Section 73.2080, requires that a broadcast licensee refrain from employment discrimination and establish and maintain an affirmative action program reflecting positive and continuing efforts to recruit, employ and promote qualified women and minorities. When evaluating EEO performance at renewal time, the Commission focuses on the licensee's efforts to recruit, employ and promote qualified women and minorities and the licensee's ongoing assessment of its EEO efforts. The latter enables the licensee to take corrective action if qualified women and minorities are not present in the applicant pool. The Commission also focuses on any evidence of discrimination by the licensee. *See* Sections 73.2080 (b) and (c) of the Commission's Rules, 47 C.F.R. Sections 73.2080 (b), 73.2080(c).

6. When a renewal application indicates a record of adequate EEO efforts, the application is granted, if otherwise appropriate. When the application indicates a record of inadequate EEO efforts, the Commission may impose a variety of sanctions or remedies, such as reporting conditions, renewal for less than a full term, forfeiture, or a combination thereof. Further, the Commission may designate the renewal application for hearing if the facts so warrant. *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987), *petition for reconsideration pending*; *see* 4 FCC Rcd 1715 (1989) (request for clarification by National Association of Broadcasters). *See also Beaumont Branch of the NAACP and the National Black Media Coalition v. FCC*, 854 F.2d 501 (D.C. Cir. 1988); *Bilingual-Bicultural Coalition on Mass Media, Inc. v. Federal Communications Commission*, 595 F.2d 621 (D.C. Cir. 1978).

7. Review of each licensee's EEO record leads us to conclude that the petitioners have presented a *prima facie* case against each challenged station so that unconditional grant of the applications for renewal would be inconsistent with the public interest. *Astroline*, *supra*. Each station's records evidenced an EEO program of inadequate EEO efforts. [3] Further inquiry was therefore necessary. *See Beaumont Branch of the NAACP v. FCC*, *supra*; *Bilingual-Bicultural Coalition*, *supra*.

8. Upon analysis of each licensee's opposition and response to our inquiry, we conclude that no substantial and material questions of fact remain so as to indicate that any of the licensees discriminated. *Astroline*, *supra*. Accordingly, designation for hearing is not warranted for

any of the stations covered by this Order. While we find that grant of the renewal applications will serve the public interest, we will impose sanctions and prospective remedies as detailed herein.

WPAP-FM, Panama City

9. Information received in response to the staff inquiry indicated that the station filled 14 full-time positions, 12 upper-level, from May 27, 1986 through October 1, 1988.[4] It appears that no outside sources were contacted for approximately ten of the 14 vacancies. For the remaining four vacancies, the station contacted the Job Training Partnership Act/Gulf Coast Community College (two minority referrals) and the newspaper (one minority referral) for an upper-level position, contacted the newspaper and a professional agency (one minority referral) for two other vacancies, and the newspaper for one vacancy.[5]

10. The data indicate that four out of 28 interviewees for full-time positions were minorities who were interviewed for only two of the 14 vacancies. Out of 14 vacancies, including 12 upper-level positions, the station hired two Blacks overall, one of whom filled an upper-level position.

11. NAACP/NBMC assert that WPAP's EEO program contained no minority organizations or minority media, and that its EEO program is essentially nonexistent.[6] In rebuttal, the licensee states that it does have an EEO program with fruitful sources. Also, the licensee believes that its employment of a full-time black news director indicates the effectiveness of its program. The licensee maintains that this factor is of "overwhelming fundamental importance because it is the only station in the entire market that has placed a minority in such a responsible position" and because the position "has a direct influence upon the station's most informational programming, and therefore directly fulfills the underlying purpose of minority employment."

12. Based on the foregoing, we find no substantial and material question of fact to warrant a hearing. The station did attract and hire minority applicants. However, the licensee's efforts and its assessment of those efforts concern us. While it is commendable that the licensee employs a minority in a responsible position, that fact, in and of itself, does not mean that a station has an affirmative and effective EEO program. We are concerned that the licensee actively recruited for only a third of its hiring opportunities, and that minorities were in the applicant pool for only two of the 14 hires.

13. The record of WPAP is similar to that of WFBR in *The Baltimore Radio Show, Inc.*, 3 FCC Rcd. 5913 (1988) (*WFBR*), where we granted renewal of the station's license subject to reporting conditions. In both cases, the licensees did not contact outside sources for many of their hiring opportunities and did not meaningfully self-assess their EEO programs. Accordingly, we will grant renewal subject to reporting conditions.

WCOA (AM)/WJLQ-FM, Pensacola

14. Information received in response to the staff inquiry indicates that the stations filled 36 full-time positions, 35 upper-level, from December 16, 1986, when the licensee took control of the station, to October 1, 1988. The recruitment sources listed in the stations' EEO program included the *Pensacola News/Journal* (two minority referrals), *Broadcasting Magazine* (three minority referrals), University of West Florida (one minority referral) and Pensacola Junior College (no minority referrals). In addition, the stations received two minority referrals from existing employees and one minority referral in response to a letter sent to Florida A & M University, Florida State, and the University of Florida. For 24 of the 36 full-time hires, no outside recruitment sources were contacted.[7]

15. The data indicate that minorities were in the applicant pool for four of 36 overall job openings, and three of 33 upper-level job openings. Out of 97 applicants for all 36 positions, there were seven minority applicants; four Blacks applying for a clerical position and a Black, Asian, and Hispanic all applying for different upper-level positions. The stations hired one Black for a lower-level position and a Black, Asian, and Hispanic for three upper-level positions.

16. NAACP/NBMC assert that WCOA/WJLQ did not include any minority organizations or minority media as recruitment sources in its EEO program.[8] In addition, they assert that most of the minority employees left shortly after the licensee assumed control of the stations in 1986. Lastly, they maintain that the stations' 1986 and 1987 employment profiles show a reduction in minority employees that is proportionately greater than the overall reduction in staff size.

17. In rebuttal, the licensee states that NAACP/NBMC's statements inaccurately summarized materials already submitted to the Commission. First, it argues that although its EEO program has no minority sources, the general sources used have proven fruitful. Second, the licensee denies that a disproportionate number of minorities left after it took control of the stations.

18. Based on the foregoing, we find no substantial and material question of fact to warrant a hearing. The licensee attracted and hired minorities during the license term. Moreover, it correctly notes that NAACP/NBMC quoted the wrong employment figures for the stations in 1987. The correct employment profile does not reflect a disproportionate reduction in minority employees. However, the licensee's overall efforts and its assessment of those efforts were inadequate. We find that WCOA/WJLQ's EEO record is similar to that of the station in *The Baltimore Radio Show, Inc.*, 3 FCC Rcd 5913 (1988) (*WFBR*) for which we granted renewal subject to reporting conditions. Like WFBR, the licensee of WCOA/WJLQ did not affirmatively recruit for a significant number of hires and did not make a meaningful assessment of its EEO program. Despite employing few Blacks in upper-level positions, the licensee of WFBR took no steps to determine if its program should be modified. Similarly, the licensee of WCOA/WJLQ made no steps to modify its program despite the fact that minorities were in the applicant pool for only four of 36 overall hires.

19. Based on the foregoing, we are giving the same sanction in this case as we gave in *WFBR*. Accordingly, we impose on WCOA/WJLQ reporting conditions for three years.

WLKF (AM)/WEZY (FM), Lakeland

20. Information received in response to the staff inquiry indicates that the stations had 34 full-time hiring opportunities, 33 upper-level, from October 1, 1984 to September 30, 1988.[9] According to the stations' EEO Program Re-

port, during the reporting year, *i.e.*, the 12-month period preceding the filing of the renewal application, the licensee contacted several general recruitment sources including Job Service of Florida (three minority referrals), Heartland Private Industries (two minority referrals), the Mayor's Advisory Committee on Employment (one minority referral), Lakeland High School (one minority referral), Travis Vo-Tech (no minority referrals), and the *Lakeland Ledger* (no minority referrals). It also reported contacting the NAACP which yielded one minority referral. The stations' employees referred three minorities. It is unclear, however, how often various recruitment sources were contacted from October 1984 to September 1988 because the licensee's response included only the referral source of the person hired. The only outside source listed in its response was newspaper ads. The most common sources listed were employee referrals and walk-ins.

21. Of the 34 hiring opportunities (33 upper-level), the licensee hired one Hispanic and two Blacks for upper-level positions.[10] Because the licensee provided applicant information for only four of the remaining 31 hires, it is unclear how often minorities were included in the applicant pools.[11] However, the applicant data provided for those four vacancies reveals that the licensee interviewed but did not select two Black females for an upper-level position and one Black male for another upper-level position.

22. NAACP/NBMC assert that the stations employed no minorities prior to 1988. In addition, NAACP/NBMC state that it is unclear whether the stations only began to conform to the EEO rule in contemplation of the pending renewal. The petitioners also note that one of the two minorities employed by the stations in 1988 is an American Indian, a minority group not substantially present in the local workforce.

23. In rebuttal, the licensee states that the stations employed minorities throughout the license term. The licensee notes, "For example, the 1987 report shows unambiguously that the stations employed three minorities in the 26 'Top Four' positions." Recognizing that processing guidelines are neither a floor nor a ceiling for measuring compliance with EEO policies, the licensee states that for the past two and a half years it has substantially met or exceeded the EEO processing guidelines. With respect to employing an American Indian, the licensee disagrees with the NAACP/NBMC's unstated inference that American Indians should count less in assessing EEO compliance because they are not substantially represented in the labor force. It states in its opposition that "the Commission has made clear that its statistical analysis results from a comparison of the percentage of *all* minorities on the station's staff with the percentage of *all* minorities in the relevant labor force."

24. Based on the foregoing, we find no substantial and material question of fact to warrant a hearing. The stations did attract and hire minority applicants. However, we are concerned that the licensee apparently lacks important information and documentation that is needed for effective self-assessment. In particular, the hiring information indicates that the licensee did not have applicant information for 30 of its 34 hires. In addition, although it is true that part of our analysis is comparing the aggregate number of minorities at a station with the aggregate number of minorities in the labor force, we put a greater emphasis on a station's efforts regarding the dominant minority in the labor force.[12] *Bilingual-Bicultural Coalition of Mass Media, Inc. v. Federal Communications Commission*, 595 F.2d 621, 625 (D.C. Cir. 1978). Blacks are the dominant minority in the Polk county labor force, representing 13.9% of the available labor force, as compared to American Indians, who comprise only .3% of the available labor force.

25. The record of WLKF/WEZY-FM is similar to that of the stations in *Applications of Certain Broadcast Stations Serving Communities in the State of Florida*, 3 FCC Rcd 1930 (1988), in which we imposed reporting conditions.

WMMB (AM)/WGGD-FM, Melbourne [13]

26. Information received in response to the staff inquiry indicates that the stations filled 23 full-time positions, 22 upper-level, from December 1986, when the licensee took control of the stations, to October 1988. The recruitment sources listed in the stations' EEO program included the *Florida Today* and *Melbourne Times* (one minority referral) and the Florida Institute of Technology.[14] However, the stations only formally recruited from these sources for seven out of 23 full-time hiring opportunities.[15] The licensee provided applicant information for five of 23 hires for which there were no minority applicants. There was no applicant data for two other formally recruited hires, and the 16 remaining openings were filled from unsolicited applicants on file. It appears that no minorities were in the applicant pool for any of the openings. Also, the information reveals that no minorities were hired for any of the 23 vacancies.

27. NAACP/NBMC assert that the licensee neither hired nor employed any minorities during its two year tenure as licensee. Moreover, NAACP/NBMC contend that the licensee's rationalization that it attracts few minority applicants because of the lure of larger Florida media markets is an unsupported attempt to shift responsibility for the station's own EEO non-compliance. NAACP/NBMC assert that none of the recruitment sources included on the licensee's 1986 assignment application was listed on the licensee's 1988 renewal application.

28. The licensee responds that there were extenuating circumstances for its record. The licensee states that since taking control of the station, most of the vacancies that opened up occurred with little or no notice given to management. Because these positions needed to be filled immediately, the licensee stated that it lacked time to contact either general or minority recruitment sources and considered applicants from unsolicited applications on file. The licensee noted that it did advertise positions in two local newspapers, a magazine, and the Florida institute of Technology where time permitted. It also evaluated its EEO program before filing its renewal application and added four more organizations to its list of recruitment sources. Noting that it owned the stations for only 21 months before filing its renewal application, the licensee maintains that it should not be held responsible for the prior licensee's failure to employ minorities at the stations during the license term.

29. In summary, in light of the licensee's short tenure, we find no substantial and material question of fact warranting further inquiry. However, we find that the EEO record of WMMB/WGGD is similar to but less egregious than that of the licensee found in *Woolfson Broadcasting, Inc.*, 4 FCC Rcd 6160 (1989) (*WSBY*) where the stations' application was granted for less than a full term, and reporting conditions for three years and a Notice of Ap-

parent Liability for Forfeiture for $15,000 were imposed. The licensee in *WSBY*, like the licensee of WMMB/WGGD, owned the stations for approximately two years prior to the filing of its renewal application. Similarly, while WSBY made no efforts to recruit minorities until the end of the license term, WMMB made virtually no efforts to recruit for any of its 23 vacancies. Further, as was the case with WSBY, no efforts can be presumed based on minority hiring because WMMB hired no full-time Black employees for its 23 vacancies. However, WSBY'S record is more egregious than WMMB/WGGD's. It had 33 vacancies in a labor force that was 19.1% Black, whereas WMMB/WGGD had 23 vacancies in a labor force that was only 7.4% Black. Moreover, in *WSBY*, the stations had an average size staff of 25 whereas WMMB/WGGD's average size staff was 17.

30. Since WMMB/WGGD's record is less egregious than that of WSBY, we are giving it a correspondingly lesser sanctions and remedies. Therefore, while hearing designation as in *Beaumont, supra*, is unwarranted in this case, reporting conditions, a short term renewal, and a forfeiture of $10,000 are warranted. A continuation of the current EEO record will lead to more stringent sanctions and/or remedies.

31. Accordingly, *IT IS ORDERED* that the petition to deny filed by the NAACP regarding stations WPAP-FM, and WLKF/WEZY-FM and the informal objection filed by the NAACP against Stations WCOA/WJLQ-FM and WMMB/WGGD-FM *ARE DENIED*.

32. *IT IS FURTHER ORDERED* that the informal objection filed by the National Black Media Coalition regarding all stations in question *IS DENIED*.

33. *IT IS FURTHER ORDERED* that the license renewal applications for WPAP-FM, WCOA/WJLQ-FM and WLKF/WEZY-FM *ARE GRANTED*, subject to reporting conditions specified herein.

34. *IT IS FURTHER ORDERED* that the license renewal applications for WMMB/WGGD-FM *ARE GRANTED FOR A SHORT TERM* ending February 1, 1992, subject to the reporting conditions specified herein and pursuant to Section 503 of the Communications Act, 47 U.S.C. Section 503, a *NOTICE OF APPARENT LIABILITY FOR FORFEITURE* in the amount of $10,000.

35. *IT IS FURTHER ORDERED* that the licensees of the above stations submit to the Commission an original and one copy of the following information on October 1, 1991, October 1, 1992, and October 1, 1993:

(a) For each report, a list of all job vacancies during the 12 months preceding the respective reporting dates, indicating the job title and full or part-time status of the position, date of hire, the race or national origin, sex and the referral source for each applicant for each job and the race or national origin and sex of the person hired. The list should also note which recruitment sources were contacted;[16]

(b) a list of employees as of the September 1, 1991, payroll period for the first report and as of the September 1, 1992 and September 1, 1993 payroll periods for the second and third reports, by job title, indicating part-time or full-time status (ranked from the highest paid classification), date of hire, sex, and race or national origin;

(c) details concerning the station's efforts to recruit minorities for each position filled during the 12-month period specified, including identification of sources used and indicating whether any of the applicants declined actual offers of employment. In addition, the licensee may submit any relevant information with regard to the station's EEO performance and efforts thereunder.

36. *IT IS FURTHER ORDERED* that the Mass Media Bureau send by Certified Mail--Return Receipt Requested one copy of the Memorandum Opinion and Order and Notice of Apparent Liability to all parties.

37. The reports are to be filed with the Secretary of the Commission for the attention of the Mass Media Bureau's EEO Branch. Should you have any questions regarding this action or require further information concerning the employment reports, you may telephone the Mass Media Bureau's EEO Branch at (202) 632-7069. With respect to the forfeiture proceeding, you may take any of the actions set forth in Section 1.80 of the Commission's Rules, 47 C.F.R. Section 1.80, as summarized in the attachment to this Order. Any comments concerning your ability to pay should include those financial items set forth in the attachment.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] Regarding several licensees' contentions that we should not consider any of petitioners' arguments in their supplemental pleading because it was not timely filed, we will consider submissions not authorized by Section 1.45 of the Commission's Rules, 47 C.F.R. Section 1.45, because we believe the public interest will be better served by doing so. 47 U.S.C. Section 151.

[2] This Order addresses the EEO efforts of WPAP-FM, Panama City (File No. BRH-880927YI) licensed to Norman S. Drubner; WCOA/WJLQ-FM, Pensacola (File Nos. BR-880930WJ and BRH-880930WK) licensed to Norman S. Drubner; WLKF/WEZY-FM, Lakeland (File Nos. BR-881003VJ and BRH-881003VK) licensed to Chapman S. Root Revocable Trust; and WMMB(AM) and WGGD-FM, formerly WMMY-FM, Melbourne (File Nos. BR-881003VE and BRH-881003YJ) licensed to City Broadcasting Company, Inc. Other stations will be considered in future Orders.

[3] None of the petitioned stations were challenged regarding the recruitment of women. Nonetheless, as is our practice in all cases, we reviewed each station's EEO efforts towards both women and minorities. We found each station's record of recruiting women sufficient.

[4] The present licensee acquired the station on May 27, 1986.

[5] The Metropolitan Statistical Area for Panama City, Florida is 12.8% minority (9.9% Black, 1.2% Hispanic, 1.7% other). In 1988, the station employed one Black on an overall staff of 17 (5.9%) and no minorities on an upper-level staff of 14. In 1987, the station employed two Blacks on an overall staff of 18

(11.1%) and no minorities on an upper-level staff of 14. No minorities worked on the station's upper-level staff of 15 in 1986, but one Black worked on the overall staff of 17 (5.9%).

[6] Although its EEO program contained no minority organizations or minority media, if a licensee obtains a meaningful pool of referrals and applicants from *e.g., exclusive* reliance on general sources, it will not be faulted for failing to contact minority specific sources. *Applications of Certain Broadcast Stations Serving Communities in the State of South Carolina*, 5 FCC 1704, 1709 n.8 (1990) (*South Carolina*).

[7] The available labor force for the Pensacola, Florida Metropolitan Statistical Area is 17.5% minority (14.3% Black, 1.3% Hispanic, .9% Asian, and .8% American Indian). In 1988, the stations had five minorities (four Blacks and one Asian) on an overall staff of 36 (13.9%) and two Blacks on an upper-level staff of 30 (6.7%). In 1987, there were five minorities (four Blacks and one Asian) on an overall staff of 37 (13.5%), and two minorities (one Black and one Asian) on an upper-level staff of 32 (6.3%). The stations' 1986 employment report indicates eight minorities (six Blacks and two Asians) on an overall staff of 48 (16.7%) and four minorities (two Blacks and two Asians) on an upper-level staff of 41 (9.8%).

[8] We note that at least one minority organization (Florida A & M University) was used by the licensee. Moreover, as stated in *South Carolina, supra*, note 6, a licensee will not be faulted for failing to contact minority specific sources if it obtains a meaningful pool of referrals and applicants from reliance on general sources.

[9] The licensee acquired Station WEZY-FM on November 10, 1983. It acquired Station WLKF(AM) on June 13, 1984 after the station had filed its annual employment report. WVFM-FM changed its call sign to WEZY-FM on January 25, 1988.

[10] The available labor force for Polk County, Florida is 17.6% minority (13.9% Black, 3.1% Hispanic, .3% Indian, .3% Asian Pacific). In 1988, the stations employed one Black and one American Indian on an overall staff of 23 (8.9%) and a Black and a American Indian on an upper-level staff of 21 (9.5%). On its 1987 staff, the stations employed two Blacks and one American Indian on the overall staff of 28 (10.7%) and its upper-level staff of 26 (11.5%). In 1986, the overall staff of 30 included one Black and one American Indian (6.7%) and the upper-level staff of 24 included one American Indian (4.2%). In 1985, the stations employed had one Black and one American Indian on an overall staff of 28 (7.1%) and on an upper-level staff of 23 (8.7%). During 1984, the station employed three minorities (one Black, one Hispanic, and one American Indian) on an overall staff of 18 (16.7%) and an upper-level staff of 16 (18.8%).

[11] The licensee protested the Commission's request for this and other detailed information in our staff inquiry. The licensee felt that such information should only be required to be kept during the renewal year and that the Commission did not have the legal right to require the information to be kept at any other time. This issue was thoroughly discussed in *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967 (1987), *aff'd in part*, 4 FCC Rcd 1715 (1989) (request for clarification by the National Association of Broadcasters (NAB)). The Commission stated that a licensee can be expected to possess the requested data, especially in light of the requirement that it engage in ongoing self-assessment of its EEO program. 4 FCC Rcd at 1716.

[12] We also consider the presence of the non-dominant minorities that are present in the workforce in significant numbers. *See generally Applications of Certain Broadcast Stations Serving Communities in the State of Texas*, 4 FCC Rcd. 6685 (1989).

[13] WMMY-FM changed its call letters to WGGD-FM on February 9, 1990.

[14] The licensee stated on its renewal application that, because of its low number of minority applicants, it had begun contacting other sources including the South Brevard and North Brevard Branches of the NAACP, Career Consultants of Melbourne, Inc., and Brevard Community College. In its opposition, the licensee repeated this statement and included letters to these sources as well as to Job Service of Florida, Women's Center of South Brevard, Florida A& M University, and the University of Central Florida informing them of specific job openings. However, all letters were dated in January 1989, the last month of the license term. There is no evidence that the licensee contacted any of the above-mentioned sources for full-time positions before January 1989.

[15] The Melbourne-Titusville-Palm Bay Metropolitan Statistical Area is 10.1% minority (7.4% Black, 1.8% Hispanic, .9% other). The Annual Employment Reports for 1987 and 1988 show no minorities on an overall staff of 17 and 19 and an upper-level staff of 17 and 17 respectively. There were no minorities on the stations overall staff of 15 and upper-level staff of 14 in 1986.

[16] Such a list might start:

1. News Director: Officials and Managers; Full-time

3 Applicants:	1 white female	A.W.R.T.
	1 black male	Urban League
	1 black female	NAACP

Sources Contacted: Local Newspaper, A.W.R.T., Urban League, and NAACP

Selected: black male (03/15/91)

SEPARATE STATEMENT OF COMMISSIONER JAMES H. QUELLO Concurring in Part and Dissenting in Part

In re: Applications for Renewal of License of Certain Broadcast Stations Serving Melbourne, Florida and Other Communities in the Florida Area

I have long been in favor of the Commission's EEO and minority ownership policies. I supported these policies when they fell into disfavor with a majority of the other Commissioners; I support them now. I am dissenting in part and writing separately, however, because I think it is important that we not lose sight of the ultimate purpose of our rules. Our goal is to ensure that Commission licensees adopt and maintain non-discriminatory hiring policies, not that they jump through bureaucratic hoops.

When the Commission amended its EEO rules and procedures in 1987, it did not alter the rules' substantive requirements. *See Amendment of Part 73 of the Commission's Rules Concering Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd. 3967, 3969 (1987) ("EEO Rules"). Our intent was to reorient the way we monitored compliance with EEO rules. Consequently, we moved away from concentrating "solely on employment data" because such a process tended to "overemphasize the statistical description of a station's workforce." *Notice of Proposed Rulemaking, MM Docket No. 85-350*, 50 Fed. Reg. 49566, 49568 (Dec. 3,

1985). We noted "[t]he Commission's principal concern in this is that broadcasters make good faith efforts to hire and promote in a non-discriminatory manner, not whether a station employment profile meets some arbitrary percentage standards." *Id.* In short, the Commission "refocus[ed] its concern on efforts rather than numbers." EEO Rules, 2 FCC Rcd. at 3971.

Our rules establish a number of EEO program options for licensees to implement "to the extent possible, and to the extent they are appropriate in terms of the station's size, location, etc." 47 C.F.R. Section 73.2080(c) (1989). Such program elements touch on dissemination of the licensee's equal opportunity policies, consultation with organizations to provide referrals, promotion policies, evaluation of the licensee's employment profile and licensee self-evaluation of its EEO program. It is important to emphasize that the rules do not prescribe a particular EEO program. As we have stressed:

> [T]he rules plainly indicate that the specific program elements, including those relating to the station's self-evaluation of its EEO profile, are intended to serve only as examples of the types of activities that would fulfill the EEO requirements. . . . [E]ach licensee must determine the most appropriate means of carrying out its EEO program based on the characteristics of the station and its local service area. For this reason, our listing of suggestions for meeting the EEO requirements is not intended to be either exclusive or inclusive but simply to provide guidance.

EEO Rules, 2 FCC Rcd. at 3969.

With these guiding principles in mind, I respectfully dissent from the Commission's decision to impose reporting conditions on WPAP-FM in Panama City, Florida, WCOA/WJLQ-FM in Pensacola, Florida and WLKF/WEZY-FM in Lakeland, Florida. I am concerned that in these instances, the Commission is more concerned with prescribing the specific elements of the stations' EEO programs than in making sure that they adopt non-discriminatory hiring practices.

With respect to WCOA/WLJQ-FM, for example, the Commission concludes that the licensee's overall recruiting efforts and its assessment of those efforts were inadequate. However, it should be pointed out that the two stations experienced a reduction in staff from 48 in 1986, to 37 in 1987, to 36 in 1988. During this time, the stations employed 8, 5 and 5 minorities, a rate not far from total minority representation in the labor force. During this period, the stations interviewed 97 applicants for 36 positions, including 7 minority applicants. Of the seven minority interviewees, four were hired – three for upper level positions. Although the Commission faults the licensee for failing to contact more outside recruiting sources, it fails to credit the fact that existing employees provided minority referrals in some instances.

I am concerned that in our quest for improving EEO procedures, we are overlooking a record of good EEO practices. Bottom line, the licensee hired over 57 percent of the minorities that applied, and almost 43 percent for upper-level positions. This is not to say that the licensees' recruiting efforts could not be improved, or that we should concentrate only on the number of minority hires. But we should accord some weight to the actual hiring practices of a station - as we do legitimately when the numbers are seriously deficient.

Accordingly, I would prefer that we not impose reporting conditions until the Commission can more clearly determine what constitutes appropriate efforts in the equal employment context.

These same considerations underscore my dissent regarding WPAP-FM in Panama City and WLKF/WEZY-FM in Lakeland. I concur with the Commission's decision in all other respects.

FOOTNOTES FOR STATEMENT

[1] There are times in the past when a majaority of the Commissioners would have voted to eliminate our minority ownership policies. Fortunately, that is not true today.

[2] *See supra* Memorandum Opinion and Order at paras. 29-30.

[3] I understand that the imposition of reporting conditions is one of the Commission's less onerous remedies. However, my concern is not with the severity of the sanction, but with the criteria for its application. Where hiring numbers can be decisive in our decision to impose a more severe sanction, they also should be given some consideration in applying a less burdensome remedy.

CONCURRING STATEMENT
OF
COMMISSIONER ERVIN S. DUGGAN

In Re: Applications for Renewal of License of Certain Broadcast Stations Serving Melbourne, Florida and Other Communities in the Florida Area.

I strongly support the Commission's goal of promoting diversity in broadcasting by encouraging broader opportunity for minority employment and ownership, and I support energetic efforts to reach those goals. In this sensitive area, however, it is important that we keep a clear focus upon those goals, and not emphasize bureaucratic niceties above actual compliance.

The goal of our equal employment opportunity policies is not to punish licensees; that is principally the task of the Equal Employment Opportunity Commission. The Commission's task, rather, is to promote employment patterns in the broadcast industry that reflect the diversity of the American people. *See Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 628 (D.C. Cir. 1978) (en banc). It was with this in mind, presumably, that the Commission stated in 1987 that its "principal concern in monitoring the EEO activities of broadcasters is with the good faith efforts of licensees to hire and promote in a nondiscriminatory manner." *Amendment of Part 73 of the Commission's Rules Concerning Equal Employment Opportunity in the Broadcast Radio and Television Services*, 2 FCC Rcd 3967, 3973 (1987).

It seems to me that a licensee's employment profile and hiring record in themselves can reflect "a good faith effort to hire and promote in a nondiscriminatory manner." Indeed, it seems reasonable to assume that a station's actual hiring results provide the best evidence of the licensee's good faith effort. In the case before us, for

example, station WPAP-FM in Panama City, Florida, filled 14.3% of its vacancies with minorities— in a metropolitan statistical area with 12.8% minorities.

My point is this: Where the results are positive, there may be less need to insist on punctilious attention to procedure and documentation. We can, in such cases, reasonably assume that the licensee is serving the ultimate objective of progress toward equal employment opportunity. Careful documentation of recruitment efforts is most important, it seems to me, as a way of assessing good faith in those cases where the hiring results may be inadequate.

I am by no means advocating that we substitute mere statistical analysis for a more comprehensive review of a licensee's equal opportunity programs and efforts. I am simply arguing that a licensee's actual record is at least as important, in my view, as record-keeping— and where the actual record is better than the record-keeping, we should not be so zealous about procedure that we risk looking foolish. Record-keeping, after all, should be a means to a goal, not the goal itself.

While I am concurring in the actions taken in this *Order,* I intend, in scrutinizing future cases, to keep two principles in mind: that our primary purpose is to encourage compliance, not simply to punish, and that when the actual results suggest good faith, a harsh emphasis on documentation and record-keeping is churlish and potentially counterproductive.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

New York Telephone Company Tariff F.C.C. No. 41 — Transmittal No. 1077

MEMORANDUM OPINION AND ORDER

Adopted: November 7, 1990; Released: November 7, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. By the captioned filing, New York Telephone Company (NYT) would introduce rates and regulations for Voice Grade Automatic Ring Down Service (VGAR). Metropolitan Fiber Systems, Inc. (MFS) and MCI Telecommunications Corporation (MCI) have filed petitions seeking rejection or suspension and investigation of NYT's tariff revisions and NYT has filed a reply. Transmittal No. 1077 is scheduled to become effective November 8, 1990. For the reasons set forth below, we reject the filing as patently unlawful because it violates Section 69.3(e)(7) of the Commission's Rules, 47 C.F.R. § 69.3(e)(7).

II. DESCRIPTION OF SERVICE

2. NYT states that the service consists of a 20 percent reduced rate for Voice Grade Channel Termination and Automatic Ring Down Signalling Capability. This discount would be available where "Alternative Access Vendors provide similar service, . . ."[1] NYT explains that it has developed this service "in response to similar competitive access offerings provided by Alternative Access Vendors." NYT Tr. No. 1077, Letter of Transmittal at 1. In its Description and Justification (D&J) NYT further explains that VGAR is a direct response to access arrangements offered by Teleport of NYT and bundled into AT&T's Financial Communications Arrangement (FCA) and MCI's Financial Connections Digital Service (FCDS). NYT argues that its rates for VGAR are justified by competitive necessity. NYT Tr. 1077, D&J at 1.

III. PLEADINGS

3. MFS argues that VGAR is clearly discriminatory on its face and that NYT does not seek to justify the rates on the basis of cost. Rather, MFS continues, NYT's sole justification for VGAR is that the rates are justified by competitive necessity. MFS Petition at 3. MFS contends that NYT has failed to demonstrate competitive necessity for its discounted VGAR rates. *Id.* at 3-5.

4. MFS also argues that VGAR contravenes other recent statements of Commission policy.[2] Further, MFS argues, NYT's rate structure would constitute unjustified geographic rate deaveraging because it would be available only to customers in certain locations. *Id.* at 6-7. Finally, MFS contends that VGAR should be rejected as unreasonably vague in violation of Section 61.2 of the Commission's Rules, 47 C.F.R. § 61.2. According to MFS, it is impossible to determine what customers would be eligible for the service because NYT would offer the service where Teleport or "other carriers" have facilities. MFS complains that NYT does not explain what "other carriers" it means. *Id.* at 7-8.

5. MCI agrees with MFS that, even assuming the Commission's competitive necessity test applies to VGAR, NYT has failed the test. MCI Petition at 2. MCI also argues that NYT's bundling the automatic ringdown feature with the discounted channel termination charge would violate Section 201(b) of the Act, 47 U.S.C. § 201(b). According to MCI, this bundling allows favored customers to receive a 20 percent discount on voice grade channel terminations simply by ordering the ringdown feature. Customers that order other optional features cannot receive this discount. MCI argues that NYT should be required to make the channel termination discount available to all voice grade private line customers. *Id.* at 2-3. Finally, MCI argues that the tariff is unreasonably vague in violation of Sections 203, 201(b), and 202(a) of the Act, 47 U.S.C. §§ 203, 201(b), 202(a), and Section 61.54 of the Commission's Rules, 47 C.F.R. § 61.54. *Id.* at 3-4.

6. In response, NYT contends that competition in its service area is robust and asserts that it has complied with the competitive necessity test. NYT Reply at 3-13. NYT denies that the provision of its tariff concerning the availability of VGAR is unreasonably vague. It argues that customers, like MCI, will know when an alternative service offering is available to them. NYT states that it would also confirm that a customer is eligible for VGAR at the time the customer orders the service. *Id.* at 10. NYT rejects MCI's suggestion that NYT should lower prices for all voice grade circuits because this would cause NYT to fail the net revenue test. *Id.* at 13-14.

7. NYT also denies that VGAR unlawfully bundles the optional signalling capability with the voice grade channel termination. NYT explains that it did this only to meet competition and observes that MCI and AT&T also bundle these services and include their own transmission services in the package as well. NYT concludes that its bundling increases customer choice and thus is reasonable. *Id.* at 15-16. Finally, NYT argues that VGAR does not represent geographic rate deaveraging. According to NYT, VGAR is available anywhere a competitor chooses to offer service and is not limited to any geographic location. *Id.* at 17.

IV. DISCUSSION

8. We need not address the parties' arguments concerning the applicability of the competitive necessity test or NYT's competitive necessity showing. Nor do we need to address issues of vagueness raised by petitioners. Rather, we reject VGAR because it violates Section 69.3(e)(7) of the Commission's Rules, 47 C.F.R. § 69.3(e)(7). That section provides that an access tariff "shall not contain charges for any access elements that are disaggregated or deaveraged within a study area that is used for purposes of jurisdictional separations." This offering is limited to areas served by "Alternative Access Vendors" and such vendors do not presently serve all of the relevant study area. Thus, the transmittal would effectively create geographic

deaveraging within a study area. NYT has not requested, much less justified, a waiver of Section 69.3(e)(7) of the Commission's Rules. VGAR constitutes a disaggregated offering of voice grade special access because it differs from NYT's general offering of voice grade service only in its lower price and its geographically restricted availability. Inasmuch as this transmittal violates an applicable Commission rule that has not been waived, the transmittal is patently unlawful. Therefore, we reject the transmittal. [3]

V. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED that pursuant to Section 69.3(e)(7) of the Commission's Rules, 47 C.F.R. § 69.3(e)(7), New York Telephone Company Tariff F.C.C. No. 41, Transmittal No. 1077 IS REJECTED.

10. IT IS FURTHER ORDERED that New York Telephone Company SHALL ISSUE revisions to its tariff no later than five business days from the release of this Order removing the rejected material. These revisions shall be scheduled to become effective on not less than one day's notice.

11. IT IS FURTHER ORDERED that Special Permission No. 90-1176 IS ASSIGNED and Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, are waived for the purpose of issuing the above revisions.

12. IT IS FURTHER ORDERED that the petitions to reject, or to suspend and investigate, filed by Metropolitan Fiber Systems, Inc., and MCI Telecommunications Corporation ARE GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] *See* New York Reply at 9, citing New York Telephone Tariff F.C.C. No. 41, 1st Revised Page 113.16.

[2] MFS cites Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, 5 FCC Rcd 400, 408 (1989) (*Strategic Pricing Reconsideration*) ; Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, 5 FCC Rcd 4842, 4846 (1990) (*ICB Reconsideration Order*); Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, 4 FCC Rcd 8634 (1989) (*ICB Order*).

[3] We note that, in discussing bundling, NYT incorrectly states that "the Commission found that [AT&T's] 'bundling' did not violate the Communications Act or the Commission's Private Line Guidelines." NYT Reply at 16. In fact, neither the Commission nor the Bureau made any such finding. The language NYT cites comes from the Bureau's summary of AT&T's position in the Bureau's Order denying NYNEX's petition against AT&T's Financial Communications Arrangement service. *See* AT&T Communications, Tr. No. 1874, 5 FCC Rcd 711 (1990). As we have cautioned in the past, all parties should be aware that such misconstruction of Commission precedent is not acceptable pleading practice. *See AT* &T Commun ic at ions, 4 FCC Rcd 5043 (Com.Car.Bur. 1989) (FTS 2000 Order).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company Revisions to Tariff F.C.C. No. 12 — Transmittal Nos. 2505, 2637, and 2642

ORDER

Adopted: November 7, 1990; Released: November 8, 1990

By the Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal Nos. 2505, 2637, and 2642 to introduce Virtual Telecommunications Network Service (VTNS) Option 61 by which AT&T will provide voice and data communications service among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. Following substantially complete installation, the rates for this option are stabilized throughout a four-year term. *See* AT&T Transmittal No. 2505, Description and Justification (D&J) at 1-4. The basic charge for VTNS Option 61 is $185,900 per month. *Id.* at 5. Transmittals 2505, 2637, and 2642 are scheduled to become effective November 10, 1990.

2. US Sprint Communications Company Limited Partnership (Sprint) and MCI Telecommunications Corporation (MCI) filed petitions to reject, or alternatively, to suspend and investigate Transmittal 2505 on September 4, 1990, and September 5, 1990, respectively. AT&T filed a reply on September 10, 1990.

3. Sprint argues that AT&T has failed to demonstrate that Option 61 is an integrated service package that is "unlike" AT&T's other component services. Sprint Petition at 1-2. Moreover, Sprint contends that AT&T's provision of 64 individual VTNS offerings makes clear that each such offering is designed for one customer. Additionally, Sprint maintains that various specifications in the transmittal also effectively restrict the offering to one customer. Sprint further argues that the individualized pricing of VTNS options is comparable to the local exchange carriers' individual case basis (ICB) rates for DS3 service, that AT&T now has sufficient experience to end its individualized pricing and develop general rates, and that the Commission thus should order AT&T to offer these rates under a generally available tariff, as it did in the ICB DS3 case. *Id.* at 2-4. Additionally, Sprint alleges that AT&T's projected 1990 revenue from all Tariff 12 VTNS options now exceeds $1.13 billion and likely accounts for more than 2 percent of the entire interexchange market. *Id.* at 4. Sprint also alleges that AT&T's cost support for Option 61 is "seriously deficient" and incorporates by reference the arguments against VTNS Options 17, 18, and 19 (AT&T Transmittals 1810, 1826, and 1832, respectively). *Id.* at 5 & n.5.

4. MCI contends that Option 61 bundles AT&T 800 service with other voice services and applies price and revenue discounts to the combined usage of the customer, thereby unlawfully conditioning the availability of the higher discounts on the combined use of voice services. MCI Petition at 2-3. MCI objects to the provision in Option 61 that permits a customer to make off-network to off-network calls through the use of authorization codes on the grounds that this is effectively the provision of ordinary MTS service among public switched network locations at preferential prices. *Id.* at 3-4. MCI also opposes the tariff provision permitting the Option 61 customer to specify and make calls between non-port and other locations. *Id.* at 3 n.4. Additionally, MCI maintains that Option 61 requires only revenue, and not volume, commitments. MCI argues that this does not give AT&T any assurance that a particular volume of traffic will be sent over its facilities. *Id.* at 4 n.5.

5. AT&T contends that the rates in Option 61 are not unjustly discriminatory because the Communications Act prohibits discrimination only between "like" services, and the Commission has held that Tariff 12 integrated service packages are not "like" the component services offered in separate tariffs. AT&T Reply at 5-6. AT&T also argues that the Commission has consistently found AT&T's standard, Commission-sanctioned cost systems sufficient to support AT&T's Tariff 12 filings. AT&T contends that these methods satisfy the requirements of Section 61.38 of the Commission's Rules. *Id.* at 8-10 & 9 n.*****. AT&T also denies that it is unlawfully bundling 800 service with other voice services. *Id.* at 3-4. Finally, AT&T maintains that Option 61 does in fact require a volume commitment. *Id.* at 5 n.**.

6. The Common Carrier Bureau has reviewed AT&T Transmittal Nos. 2505, 2637, and 2642, Sprint's and MCI's petitions, and related pleadings. We conclude that no compelling argument has been presented that this tariff is so patently unlawful as to warrant rejection.

7. On October 23, 1990, the U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded the Commission's Order in CC Docket No. 87-568, AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932, *recon. denied*, 4 FCC Rcd 7928 (1989). *See MCI Telecommunications Corp. v. FCC*, No. 89-1382 *et al.*, slip op. (D.C. Cir. Oct. 23, 1990). Although these transmittals do not present new questions that warrant investigation at this time, they could be affected by the Commission decision in the CC Docket No. 87-568 remand proceedings. Accordingly, Transmittal Nos. 2505, 2637, and 2642 are accepted subject to the outcome of the remand proceedings in CC Docket No. 87-568.

8. Accordingly, IT IS ORDERED that the petitions to reject, or to suspend and investigate, American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 2505, filed by US Sprint Communications Company Limited Partnership and MCI Telecommunications Corporation, ARE DENIED.

9. IT IS FURTHER ORDERED, that Transmittal Nos. 2505, 2637, and 2642 take effect subject to the outcome of remand proceedings in CC Docket No. 87-568.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone;
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company	Transmittal Nos. 2510, 2511, 2637, and 2642
Revisions to Tariff F.C.C. No. 12	

ORDER

Adopted: November 7, 1990; Released: November 8, 1990

By the Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal Nos. 2510, 2511, 2637, and 2642 to introduce Virtual Telecommunications Network Service (VTNS) Options 62 and 63 by which AT&T will provide voice and data communications service among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. Following substantially complete installation, the rates for each option are stabilized throughout a three-year term. *See* AT&T Transmittal No. 2510, Description and Justification (D&J) at 1-4; AT&T Transmittal No. 2511, D&J at 1-4. The basic charge for VTNS Option 62 is $126,800 per month, while the basic charge for VTNS Option 63 is $16,600 per month. *See* AT&T Transmittal No. 2510, D&J at 5; AT&T Transmittal No. 2511, D&J at 5. Transmittals 2510, 2511, 2637, and 2642 are scheduled to become effective November 10, 1990.

2. US Sprint Communications Company Limited Partnership (Sprint) and MCI Telecommunications Corporation (MCI) filed petitions to reject, or alternatively, to suspend and investigate Transmittals 2510 and 2511 on September 4, 1990, and September 10, 1990, respectively. AT&T filed a reply on September 17, 1990.

3. Sprint argues that AT&T has failed to demonstrate that Options 62 and 63 are integrated service packages that are "unlike" AT&T's other component services. Sprint Petition at 1-2. Moreover, Sprint contends that AT&T's provision of 64 individual VTNS offerings makes clear that each such offering is designed for one customer. Additionally, Sprint maintains that various specifications in the transmittal also effectively restrict the offering to one customer. Sprint further argues that the individualized pricing of VTNS options is comparable to the local exchange carriers' individual case basis (ICB) rates for DS3 service, that AT&T now has sufficient experience to discontinue its individualized pricing and develop general rates, and that the Commission thus should order AT&T to offer these rates under a generally available tariff, as it did in the ICB DS3 case. *Id.* at 2-4. Additionally, Sprint alleges that AT&T's projected 1990 revenue from all Tariff 12 VTNS options now exceeds $1.13 billion and likely accounts for more than 2 percent of the entire interexchange market. *Id.* at 4. Sprint also alleges that AT&T's cost support for Options 62 and 63 is "seriously deficient" and incorporates by reference the arguments against VTNS Options 17, 18, and 19 (AT&T Transmittals 1810, 1826, and 1832, respectively)*Id.* at 5 & n.5.

4. MCI contends that Options 62 and 63 bundle AT&T 800 service with other voice services and apply price and revenue discounts to the combined usage of the customer, thereby unlawfully conditioning the availability of the higher discounts on the combined use of voice services. MCI Option 62 Petition at 2-3; MCI Option 63 Petition at 2-3. MCI also objects to the provisions in Options 62 and 63 that permit a customer to make off-network to off-network calls through the use of authorization codes on the grounds that this is effectively the provision of ordinary MTS service among public switched network locations at preferential prices. MCI Option 62 Petition at 3; MCI Option 63 Petition at 3-4. MCI also opposes the tariff provisions permitting Option 62 and 63 customers to specify and make calls between non-port and other locations. MCI Option 62 Petition at 3 n.4; MCI Option 63 Petition at 3 n.4. Additionally, MCI maintains that Options 62 and 63 require only revenue, and not volume, commitments. MCI argues that this does not give AT&T any assurance that a particular volume of traffic will be sent over its facilities. MCI Option 62 Petition at 3 n.5; MCI Option 63 Petition at 4 n.5.

5. AT&T contends that the rates in Options 62 and 63 are not unjustly discriminatory because the Communications Act prohibits discrimination only between "like" services, and the Commission has held that Tariff 12 integrated service packages are not "like" the component services offered in separate tariffs. AT&T Reply at 5-6. AT&T also argues that the Commission has consistently found AT&T's standard, Commission-sanctioned cost systems sufficient to support AT&T's Tariff 12 filings. AT&T contends that these methods comply with the requirements of Section 61.38 of the Commission's Rules. *Id.* at 8-10 & 9 n.*****. AT&T also denies that it is unlawfully bundling 800 service with other voice services. *Id.* at 3-4. Finally, AT&T maintains that Options 62 and 63 do require a volume commitment from customers. *Id.* at 5 n.**.

6. The Common Carrier Bureau has reviewed AT&T Transmittal Nos. 2510, 2511, 2637, and 2642, Sprint's and MCI's petitions, and related pleadings. We conclude that no compelling argument has been presented that this tariff is so patently unlawful as to warrant rejection.

7. On October 23, 1990, the U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded the Commission's Order in CC Docket No. 87-568, AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932, *recon. denied*, 4 FCC Rcd 7928 (1989). *See MCI Telecommunications Corp. v. FCC*, No. 89-1382 *et al.*, slip op. (D.C. Cir. Oct. 23, 1990). Although these transmittals do not present new questions that warrant investigation at this time, they could be affected by the Commission decision in the CC Docket No. 87-568 remand proceedings. Accordingly, Transmittal Nos. 2510, 2511, 2637, and 2642 are accepted subject to the outcome of the remand proceedings in CC Docket No. 87-568.

8. Accordingly, IT IS ORDERED that the petitions to reject, or to suspend and investigate, American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal Nos. 2510 and 2511, filed by US Sprint Communications Company Limited Partnership and MCI Telecommunications Corporation, ARE DENIED.

9. IT IS FURTHER ORDERED, that Transmittal Nos. 2510, 1511, 2637, and 2642 take effect subject to the outcome of remand proceedings in CC Docket No. 87-568.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone;
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

GTE Telephone Operating Companies Revisions to Tariff F.C.C. No. 1 — Transmittal No. 618

MEMORANDUM OPINION AND ORDER

Adopted: October 29, 1990; Released: October 29, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On August 1, 1990, the GTE Service Corporation and its associated operating companies (GTOC) proposed a Common Channel Signalling (CCS) network access service. The tariff revisions are scheduled to go into effect on October 30, 1990. As discussed below, GTOC has failed to comply with the Commission's cost support rules in its filings. We therefore reject Transmittal 618.

II. PROVISIONS OF TRANSMITTAL 618

2. CCS Access will enable interexchange carriers (ICs) to interconnect with GTOC's CCS network. This would provide ICs with out-of-band signalling and call set-up services, and the use of a variety of databases to be developed by GTOC in the future. These services in turn would enable ICs to provide new services to end users. Examples of these new services include database 800 service, under which end users receive number portability, and calling card validation services, which facilitate billed party preference. GTOC Description and Justification (D&J) at 1-2.

3. GTOC expects that the first two services available through CCS access service will be access to GTOC's line identification database (LIDB) and Feature Group D with out-of-band signalling. *Id.* at 2. GTOC plans to place one mated pair of STPs in Santa Monica and Ontario, California, and one mated pair of STPs in Bloomington, Illinois, and Fort Wayne, Indiana. *Id.* at 3. GTOC divides its service into a "port" and an access link. The access link will be a DS1 line priced under special access. *Id.* at 4, *citing* GTOC Tariff F.C.C. No. 1, Section 5. GTOC proposes to require ICs to take the access link from GTOC, but will allow ICs to choose any location as a signalling point of interface (SPOI). *Id.* at 4-5. GTOC claims that the STP is properly assigned to COE Separations Category 2, and that STP costs should be recovered through local transport charges. *Id.* at 4. GTOC also maintains that it can take advantage of the blanket Transport waiver established in 1985.[1] *Id.*

4. GTOC proposes a flat monthly rate, composed of a geographic average of California, Illinois, and Indiana costs. *Id.* at 6-7. GTOC maintains that the two pairs of STPs will have 512 ports, but that GTOC will need 436 ports for internal use. As a result, GTOC would make only 76 ports available to the public. *Id.* at 7. The monthly STP rate would recover costs associated with the termination of the access links, while other STP costs would be recovered through LIDB charges and "currently effective switched access rates." *Id.* at 7-8. GTOC contends that the STP cannot measure usage, and that a flat rate is justified because of this. *Id.* at 8. Finally, GTOC develops a percent interstate usage factor (PIU) of 38.09 percent from a weighted average of expected dial equipment minutes (DEMs) usage in California, Illinois, and Indiana. *Id.* at 8-9, exh. 3.

III. SUMMARY OF PLEADINGS

A. Petitions

5. International Telecharge, Inc. (ITI) and MCI Telecommunications Corporation (MCI) argue that GTOC's transmittal is analogous to Pacific Bell Transmittal No. 1462, which the Bureau rejected as vague and not in compliance with Section 61.38(b) of the Commission's Rules. ITI Petition at 2-4, MCI Petition at 2-3, *citing* Pacific Bell, Revisions to Tariff F.C.C. No. 128, 5 FCC Rcd 4060 (Com.Car.Bur. 1990) (*Pacific Bell Order*).

6. Both petitioners argue that LIDB is not a detariffed billing and collection service. ITI notes that the *Billing and Collection Order* appears to limit billing and collection services to administrative functions. ITI Petition at 4-5, *citing Detariffing of Billing and Collection Services*, CC Docket No. 85-88, 102 FCC 2d 1150, 1168 (1986)(*Billing and Collection Order*). ITI also notes that the *Billing and Collection Order* found billing and collection services not to be Title II services because they do not employ wire or radio facilities. ITI argues that LIDB cannot be billing and collection because it does use wire or radio facilities. *Id.* at 5. MCI asserts that LIDB should be tariffed because it is essential to the ICs' ability to complete credit card calls. MCI claims that LIDB is analogous to automatic number identification (ANI) for this reason. MCI Petition at 4.

7. ITI also questions GTOC's monthly rate of $400.00 when its price support seems to indicate its costs are only $386.78 per month. ITI Petition at 9. ITI asserts that GTOC based part of its revenue requirement on ports it has reserved for its internal use. *Id.* Finally, ITI accuses GTOC of incorrectly assuming interstate CCS costs are equal to intrastate CCS costs. *Id.* at 10. MCI claims GTOC has not directly assigned costs to the interstate or intrastate jurisdiction whenever possible. Also, MCI claims that the separations factor should be based on minutes of use (MOUs) rather than DEMs, and that this reduces the interstate portion from 38.09 percent to 16.90 percent. MCI Petition at 8-9, and Table 1.

8. MCI contends that Transmittal 618 violates the "equal per unit" requirement of the GTOC Final Judgment because GTOC proposes to recover transport costs on a flat basis. MCI maintains that the blanket Transport waiver does not affect this requirement. *Id.* at 6, *citing* United States v. GTE, 48 Fed. Reg. 22020, 22025 (1984). MCI also criticizes GTOC's transmittal because it does not provide for direct IC connection to databases, or for out-of-band signalling for Feature Group B service. *Id.* at 6-8. MCI suggests that GTOC's proposal may allow cross-subsidization between geographic regions, or between LIDB and other services. *Id.* at 10-11. Finally, ITI accuses GTOC of tariffing access to a switch, and contends this is not a useful service by itself. ITI Petition at 6-7.

B. Reply

9. GTOC argues that it has defined terms and described CCS-related services to a greater extent than did Pacific Bell in its Transmittal 1462. GTOC Reply at 3. It claims that tariffing the piece-part facility from the IC point of presence (POP) to the STP is consistent with the Commission's Part 69 Rules and Open Network Architecture (ONA) principles. *Id.* at 2-4. GTOC also criticizes the Commission, alleging that it has unnecessarily delayed other CCS filings. *Id.* at 4 n.2.

10. The GTOCs maintain that "LIDB is available to be provided immediately," however, they contend that "the tariff as filed simply offers access to the GTOCs' SS7 network for signaling [*sic*] purposes," and claims that the Title II status of LIDB is not at issue now. *Id.* at 3 and 5-6. GTOC maintains that its estimate of relative interstate and intrastate usage is reasonable and the best available prior to any actual experience providing the service. *Id.* at 7-9. GTOC recalculates its separations factor based on the relative number of study area minutes of use as suggested by MCI, but claims this does not affect its rates. *Id.* at 8. GTOC alleges that the introduction of CCS services has a *de minimis* effect on Local Transport rates, and that no adjustment of Local Transport rates is necessary to avoid double recovery. *Id.* at 9-10. GTOC denies that its rates produce cross-subsidization between geographical areas because it claims it redistributes costs and revenues to prevent this. *Id.* at 10.

11. GTOC further argues that the "equal per unit" requirement of the GTE Consent Decree is applicable only to connections between end offices and IC facilities, and that the STP is not an "end office" for purposes of this Decree. *Id.* at 11-12. GTOC also asserts that it does not require a waiver to establish non-usage-based transport charges. GTOC claims its flat monthly charge is usage-based because larger users require more ports, and therefore pay more. *Id.* at 12. GTOC also contends that its service is covered by the general transport waiver. *Id.* at 12-13. GTOC maintains that direct connection to the database is not possible for "network security" reasons. *Id.* at 14. It also discounts MCI's concern for potential discrimination because it claims it routes its database access through the STPs. *Id.* at 15.

IV. DISCUSSION

12. We conclude that Transmittal 618 does not comply with Section 61.38(b)(2)(ii) of the Commission's Rules. 47 C.F.R. § 61.38(b)(2)(ii), and we therefore must reject the filing. Section 61.38(b)(2)(ii) requires carriers to provide, in support of their transmittals, estimates of the effects of a proposed service on their overall traffic and revenues. Specifically, the rule provides that:

> For a tariff filing offering a new service, the carrier must submit . . . [e]stimates of the effect of the new [tariff] on the traffic and revenues from the service to which the new [tariff] applies, the carrier's other service classifications, and the carrier's overall traffic and revenues. These estimates must include the projected effects on the traffic and revenues for [a] representative 12-month period . . . .

Id. The rule also requires that the carrier include "complete explanations of the bases for the estimates." *Id.*

13. This information is necessary to aid the Commission in determining whether rates proposed for new services are just and reasonable, in accordance with Section 201(b) of the Communications Act, 47 U.S.C. §201(b). Moreover, the information required by Section 61.38(b)(2)(ii) also enables the Commission to assess whether introduction of the new service will require any adjustment of existing rates in order to ensure that such existing rates remain just and reasonable. Without the information required by Section 61.38(b)(2)(ii), the Commission is not in a position to assess whether the carrier's rates pass the statutory test; a failure to provide this information has the effect of the carrier's seeking to charge a rate without providing the Commission with any meaningful roadmap with regard to the development of the rate.

14. In the case of Transmittal 618, GTOC requires customers to order additional DS1 lines as part of the proposed CCS access service. Any change in the demand for DS1 service as a result of this filing could have an impact on the just and reasonable rate for the DS1 service. However, by failing to comply with the Section 61.38(b)(2)(ii) requirement to include information as to the impact of Transmittal 618 on demand for GTOC's DS1 service, GTOC has frustrated the Commission's effort to discharge its statutory responsibility to ascertain the reasonableness of GTOC's rates.

15. Since GTOC has failed to comply with Section 61.38(b)(2)(ii), Transmittal 618 is patently unlawful and must be rejected.

V. ORDERING CLAUSES

16. Accordingly, IT IS ORDERED that the petitions for rejection or suspension and investigation filed by MCI Telecommunications Corp. and International Telecharge, Inc. ARE GRANTED, to the extent indicated herein, and otherwise ARE DENIED.

17. IT IS FURTHER ORDERED that GTE Telephone Operating Companies, Tariff F.C.C. No. 1, Transmittal No. 618, IS REJECTED.

18. IT IS FURTHER ORDERED that GTE Telephone Operating Companies shall file revisions to its tariff no later than five days from the release date of this Order in order to remove the rejected material from the tariff. These revisions shall be scheduled to become effective on one day's notice. For this purpose we waive Sections 61.58. and 61.59 of the Commission's Rules. 47 C.F.R. §§ 61.58, 61.59, and assign Special Permission No. 90-1147.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTE

[1] In 1983, the Commission granted a temporary waiver of Sections 69.111 and 69.112 to enable American Telephone and Telegraph Company (AT&T) and the Bell Operating Companies (BOCs) to file access tariffs that complied with the "equal charge per unit of traffic delivered or received" requirement of the Consent Decree ordering the divestiture of the Bell System.

This waiver was later extended to May 1985, and then indefinitely extended until further notice. MTS and WATS Market Structure, CC Docket No. 78-72, 97 FCC 2d 834, 862 (1984)(*Local Transport* Waiver Order).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

American Telephone and Telegraph Company Revisions to Tariff F.C.C. No. 12 — Transmittal No. 2500

ORDER

Adopted: November 7, 1990; Released: November 8, 1990

By the Chief, Common Carrier Bureau:

1. American Telephone and Telegraph Company (AT&T) has filed Transmittal No. 2500 to introduce Virtual Telecommunications Network Service (VTNS) Option 60 by which AT&T will provide voice and data communications service among locations in the United States, Puerto Rico, the U.S. Virgin Islands, and specific international locations. Following substantially complete installation, the rates for this option are stabilized throughout a five-year term. *See* AT&T Transmittal No. 2500, Description and Justification (D&J) at 1-4. The basic charge for VTNS Option 60 is $184,000 per month. *Id.* at 5. Transmittal 2500 is scheduled to become effective November 10, 1990.

2. US Sprint Communications Company Limited Partnership (Sprint) and MCI Telecommunications Corporation (MCI) filed petitions to reject, or alternatively, to suspend and investigate Transmittal 2500 on September 4, 1990. AT&T filed a reply on September 10, 1990.

3. Sprint argues that AT&T has failed to demonstrate that Option 60 is an integrated service package that is "unlike" AT&T's other component services. Sprint Petition at 1-2. Moreover, Sprint contends that AT&T's provision of 64 individual VTNS offerings makes clear that each such offering is designed for one customer. Additionally, Sprint maintains that various specifications in the transmittal also effectively restrict the offering to one customer. Sprint further argues that the individualized pricing of VTNS options is comparable to the local exchange carriers' individual case basis (ICB) rates for DS3 service, that AT&T now has sufficient experience to end its individualized pricing and develop general rates, and that the Commission thus should order AT&T to offer these rates under a generally available tariff, as it did in the ICB DS3 case. *Id.* at 2-4. Additionally, Sprint alleges that AT&T's projected 1990 revenue from all Tariff 12 VTNS options now exceeds $1.13 billion and likely accounts for more than 2 percent of the entire interexchange market. *Id.* at 4. Sprint also alleges that AT&T's cost support for Option 60 is "seriously deficient" and incorporates by reference the arguments against VTNS Options 17, 18, and 19 (AT&T Transmittals 1810, 1826, and 1832, respectively). *Id.* at 5 & n.5.

4. MCI contends that Option 60 bundles AT&T 800 service with other voice services and applies price and revenue discounts to the combined usage of the customer, thereby unlawfully conditioning the availability of the higher discounts on the combined use of voice services. MCI Petition at 2-3. MCI objects to the provision in Option 60 that permits a customer to make off-network to off-network calls through the use of authorization codes on the grounds that this is effectively the provision of ordinary MTS service among public switched network locations at preferential prices. *Id.* at 3-4. MCI also opposes the tariff provision permitting the Option 60 customer to specify and make calls between non-port and other locations. *Id.* at 3 n.4. Additionally, MCI maintains that Option 60 requires only revenue, and not volume, commitments. MCI argues that this does not give AT&T any assurance that a particular volume of traffic will be sent over its facilities. *Id.* at 4 n.5.

5. AT&T contends that the rates in Option 60 are not unjustly discriminatory because the Communications Act prohibits discrimination only between "like" services, and the Commission has held that Tariff 12 integrated service packages are not "like" the component services offered in separate tariffs. AT&T Reply at 5-6. AT&T also argues that the Commission has consistently found AT&T's standard, Commission-sanctioned cost systems sufficient to support AT&T's Tariff 12 filings. AT&T contends that these methods satisfy the requirements of Section 61.38 of the Commission's Rules. *Id.* at 8-10 & 9 n.*****. AT&T also denies that it is unlawfully bundling 800 service with other voice services. *Id.* at 3-4. Finally, AT&T maintains that Option 60 does require a volume commitment. *Id.* at 5 n.**.

6. The Common Carrier Bureau has reviewed AT&T Transmittal No. 2500, Sprint's and MCI's petitions, and related pleadings. We conclude that no compelling argument has been presented that this tariff is so patently unlawful as to warrant rejection.

7. On October 23, 1990, the U.S. Court of Appeals for the District of Columbia Circuit reversed and remanded the Commission's Order in CC Docket No. 87-568, AT&T Communications, Revisions to Tariff F.C.C. No. 12, Memorandum Opinion and Order, 4 FCC Rcd 4932, *recon. denied*, 4 FCC Rcd 7928 (1989). *See MCI Telecommunications Corp. v. FCC*, No. 89-1382 *et al.*, slip op. (D.C. Cir. Oct. 23, 1990). Although this transmittal does not present new questions that warrant investigation at this time, it could be affected by the Commission decision in the CC Docket No. 87-568 remand proceedings. Accordingly, Transmittal No. 2500 is accepted subject to the outcome of the remand proceedings in CC Docket No. 87-568.

8. Accordingly, IT IS ORDERED that the petitions to reject, or to suspend and investigate, American Telephone and Telegraph Company Tariff F.C.C. No. 12, Transmittal No. 2500, filed by US Sprint Communications Company Limited Partnership and MCI Telecommunications Corporation, ARE DENIED.

9. IT IS FURTHER ORDERED, that Transmittal No. 2500 takes effect subject to the outcome of remand proceedings in CC Docket No. 87-568.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-303

In the Matter of

Amendment of Section 73.202(b), RM-7291
Table of Allotments,
FM Broadcast Stations.
(Harlan, Iowa)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: October 29, 1990; Released: November 14, 1990

By the Assistant Chief, Policy and Rules Division:

1. At the request of John Talbott d/b/a KNOD (petitioner), the Commission has before it the *Notice of Proposed Rule Making*, 5 FCC Rcd 3490 (1990), proposing the substitution of Channel 287C3 for Channel 288A at Harlan, Iowa, and modification of the license for Station KNOD(FM) to specify operation on the higher powered channel. Petitioner filed comments reiterating his intention to apply for the channel, if allotted. No other comments were received.

2. We believe the public interest would be served by substituting Channel 287C3 for Channel 288A at Harlan, Iowa, since it could provide the community with a wide coverage area FM service. Channel 287C3 can be allotted to Harlan in compliance with the Commission's minimum distance separation requirements and can be used at Station KNOD(FM)'s licensed transmitter site.[1] As proposed, we will also modify petitioner's license for Station KNOD(FM) to specify operation on Channel 287C3.

3. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **December 31, 1990**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED, with respect to the community listed below, to read as follows:

City	Channel No.
Harlan, Iowa	287C3

4. IT IS FURTHER ORDERED, pursuant to Section 316(a) of the Communications Act of 1934, as amended, that the license of John Talbott d/b/a KNOD, for Station KNOD(FM), Harlan, Iowa, IS MODIFIED to specify operation on Channel 287C3, in lieu of Channel 288A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the licensee shall submit to the Commission a minor change application for a construction permit (Form 301).

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620.

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental impact statement pursuant to Section 1.1301 of the Commission's Rules.

5. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

6. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

FOOTNOTE

[1] The coordinates for Channel 287C3 at Harlan are North Latitude 41-37-00 and West Longitude 95-16-10.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-539

In the Matter of

Amendment of Section 73.202(b), RM-7181
Table of Allotments,
FM Broadcast Stations.
(Howland, Maine)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 29, 1990; Released: November 14, 1990

By the Assistant Chief, Policy and Rules Division:

1. The Commission has before it for consideration a petition for rule making filed by Bay Communications, Inc. (petitioner), requesting the substitution of Channel 280C for Channel 280A at Howland, Maine. Petitioner also requests the modification of its construction permit for Station WPVM to specify operation on Channel 280C. Petitioner submitted information in support of the proposal and stated its intention to file an application for Channel 280C, if allotted.

2. Petitioner requests that Channel 280C be allotted to Howland, Maine, with a site restriction of 26.8 kilometers (16.6 miles) southeast of the community.[1] The site specified by petitioner enables it to erect a tower in an area of other broadcast towers and provide the community of license with the required city-grade coverage.

3. Our review of petitioner's proposal confirms that Channel 280C can be allotted to Howland in compliance with the Commission's minimum distance separation requirements at petitioner's specified site. Our study also shows that the allotment would be short-spaced to four Canadian stations or allotments: (1) Station CBZA, Channel 279A, Grand Manan, New Brunswick; (2) Station CFQM, Channel 280C, Moncton, New Brunswick; (3) the proposed allotment of Channel 280A at St. Joseph, Quebec; and (4) the vacant allotment of Channel 281B at Woodstock, New Brunswick. We have received concurrence from the Canadian government for the allotment of Channel 280C at Howland as a specially negotiated short-spaced allotment. We shall propose to modify the construction permit (BPH-881201MI) of Bay Communications, Inc. to specify operation on Channel 280C in accordance with Section 1.420(g) of the Commission's Rules.

4. We believe the public interest would be served by proposing the substitution of Channel 280C for Channel 280A at Howland, Maine, since it could provide the community with a wide coverage area service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Howland, Maine	280A	280C

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **January 7, 1991,** and reply comments on or before **January 22, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Robert J. Rini
Brown, Finn & Nietert, Chartered
1920 N Street, N.W.
Suite 660
Washington, D.C. 20036
(Counsel to petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 280C are 45-07-46 and 68-21-28.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-538

In the Matter of

Amendment of Section 73.202(b), RM-7508
Table of Allotments,
FM Broadcast Stations.
(Tomah, Wisconsin)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 29, 1990; Released: November 14, 1990

By the Assistant Chief, Policy and Rules Division:

1. Before the Commission for consideration is a petition for rule making filed by Jamie Lee Westpfahl (petitioner), requesting the substitution of FM Channel 233C3 for Channel 233A at Tomah, Wisconsin. Petitioner also requests modification of her construction permit for Station WZFR, Channel 233A, to specify operation on Channel 233C3. Petitioner provided an engineering study in support of the request and indicated her intention to file an application for the channel, if allotted.

2. We believe petitioner's proposal warrants consideration because this could provide Tomah with an additional wide coverage area FM channel. Channel 233C3 can be allotted to Tomah, Wisconsin, in compliance with the Commission's Rules at a site located 15 kilometers (9.3 miles) east of the community.[1] This restricted site will avoid a short-spacing to the construction permit (BPH-900129IC) for Channel 232C2 at Prairie du Chien, Wisconsin, as well as the construction permit (BPH-881206MB) and modification application (BAPH-900627IG) of Station KKOO(FM), Channel 234A, Caledonia, Minnesota. We shall also propose to modify the construction permit for Station WZFR (BPH-861203MB) in accordance with Section 1.420(g) of the Commission's Rules. Pursuant to this rule, we will not accept competing expressions of interest for use of Channel 233C3 at Tomah or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

3. In order to provide an additional wide coverage area station for Tomah, Wisconsin, the Commission proposes to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, as follows:

	Channel No.	
City	Present	Proposed
Tomah, Wisconsin	233A, 241A, 255C	233C3, 241A, 255C

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 7, 1991,** and reply comments on or before **January 22, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Riley & Bergquist, P.A.
5200 Willson Road
Suite 308
Edina, Minnesota 55424
(Counsel for the petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTE

[1] The coordinates for Channel 233C3 are 43-57-19 and 90-19-20.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-537

In the Matter of

Amendment of Section 73.202(b), RM-7455
Table of Allotments,
FM Broadcast Stations.
(Amarillo, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: October 29, 1990; Released: November 14, 1990

By the Assistant Chief, Policy and Rules Division:

1. A petition for rule making has been filed by Alton Lloyd Finley, Jr. (petitioner) seeking the allotment of FM Channel 241A to Amarillo, Texas, as that community's tenth local FM service. Petitioner stated his intention to apply for the channel, if allotted.

2. A staff engineering analysis has determined that Channel 241A can be allotted to Amarillo in conformity with the minimum distance separation requirements of Section 73.207(b) of the Commission's Rules, provided the transmitter is located at least 7.4 kilometers (4.6 miles) northeast[1] of the community to avoid a short-spacing to Channel 240C3, Dimmitt, Texas.[2]

3. We believe the proposal is in the public interest since it could provide an additional local FM broadcast voice to Amarillo. Therefore, the Commission believes it is appropriate to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the community listed below, as follows:

	Channel No.	
City	Present	Proposed
Amarillo, Texas	226C1,231C, 245C, 250C, 254C1,265C1, 270C,275C1, 289A3	226C1,231C, 241A, 245C, 250C,254C1, 265C1,270C, 275C1, 289A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **January 7, 1991,** and reply comments on or before **January 22, 1991,** and are advised to read the Appendix for the proper procedures. Additionally, a copy of such comments should be served on the petitioner, as follows:

Alton Lloyd Finley, Jr.
Rural Route 5, Box 442-M
Seneca, SC 29678

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202 (b), 73.504 and 73.606 (b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Beverly McKittrick
Assistant Chief
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the

channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

FOOTNOTES

[1] Coordinates for Channel 241A at Amarillo are 35-16-00 and 101-47-37.

[2] Coordinates for Channel 240C3 at Dimmitt are 34-35-11 and 102-18-35. Channel 240C3 is reserved for Station KDIU(FM), Channel 240A, pursuant to MM Docket No. 89-190, 5 FCC Rcd 2151 (1990).

[3] Channel 289A, allotted to Amarillo in MM Docket No. 88-419, 4 FCC Rcd 5744 (1989) was inadvertently omitted from the Table in the *Report and Order* in MM Docket No. 89-381, 5 FCC Rcd 5416 (1990), that allotted Channel 265C1 to Amarillo.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

MCI TELECOMMUNICATIONS CORPORATION,
Complainant,

v.

THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANIES,	File No. E-88-49
NEW JERSEY BELL TELEPHONE COMPANY and	File No. E-88-50
THE DIAMOND STATE TELEPHONE COMPANY,	File No. E-88-55

Defendants.

ORDER

Adopted: November 8, 1990; Released: November 15, 1990

By the Chief, Enforcement Division, Common Carrier Bureau:

1. The parties to the above-captioned proceedings, MCI Telecommunications Corporation (hereinafter "MCI") and The Chesapeake and Potomac Telephone Companies, New Jersey Bell Telephone Company and The Diamond State Telephone Company (hereinafter the "Defendants") have filed a Joint Motion requesting that the Commission dismiss with prejudice the above-captioned formal complaints. For the reasons set forth below, we grant the requested relief.

2. These proceedings were initiated by formal complaints filed by MCI against the Defendants on February 9, 1988, alleging that the Defendants' charges for interstate access services for the period October 1, 1985 through December 31, 1986 produced earnings in excess of the Commission's prescribed rate of return and, therefore, were unlawful under Section 201(b) of the Communications Act, 47 U.S.C. § 201(b). The Defendants denied the allegations and moved to dismiss the complaints.

3. On December 12, 1989, the Commission, in a Memorandum Opinion and Order,[1] concluded that MCI had met its burden of establishing that the Defendants violated the Act by earning in excess of the Commission's prescribed rate of return and was liable to MCI to the extent that MCI could establish that it was damaged as a result of the violations. The Commission further ruled that MCI was entitled to pursue its damage claims in supplemental complaints as provided in Section 1.722 of the Rules, 47 C.F.R. § 1.722.

4. On March 12, 1990, MCI filed supplemental complaints for damages. In accordance with Commission rules, the Defendants filed answers to the supplemental complaints. On August 16, 1990, however, the parties filed the instant motion seeking dismissal of the complaints with prejudice. The parties state that a mutually agreeable settlement of all pending controversies has been reached. We are satisfied that dismissal of the complaints will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

5. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the Joint Motion to Dismiss the above-captioned complaints IS GRANTED and that the proceedings ARE TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

FOOTNOTE

[1] *MCI Telecommunications Corp v. Pacific Northwest Bell Telephone Co., et al.*, 5 FCC Rcd 216 (1990).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AMERICAN TELEPHONE
AND TELEGRAPH COMPANY.
Complainant.

v. File No.E-89-195

CONCORD TELEPHONE COMPANY.
Defendant.

ORDER

Adopted: November 8, 1990; Released: November 15, 1990

By the Chief. Enforcement Division, Common Carrier Bureau:

1. On May 23, 1989, American Telephone and Telegraph Company (AT&T) filed the above-captioned formal complaint against Concord Telephone Company (Concord), alleging violations of Sections 201(b) and 203 of the Communications Act, 47 U.S.C. §§ 201(b), 203. AT&T alleged that Concord improperly sought to divert to another interexchange carrier all of AT&T's operator-handled (0+) interstate traffic originating in Concord's serving area. Concord denied such allegations and asserted, inter alia, that AT&T was attempting to avoid competition and to enhance its revenues at the expense of Concord's subscribers.

2. On November 6, 1990, AT&T filed a motion requesting dismissal of the complaint with prejudice. In support of its motion, AT&T states that, in light of subsequent business dealings between the parties, AT&T no longer wishes to prosecute its complaint. AT&T further states that Concord concurs in the motion to dismiss.

3. We are satisfied that dismissal of this complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources of the parties and of this Commission.

4. Accordingly, IT IS ORDERED, pursuant to authority delegated by Section § 0.291 of the Commission's Rules, 47 C.F.R. 0.291, that AT&T's Motion to Dismiss IS GRANTED.

5. IT IS FURTHER ORDERED that the complaint filed by AT&T on May 23, 1989 in the above-captioned proceeding IS DISMISSED WITH PREDJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Mary Beth Hess
Chief, Enforcement Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE
Released: November 15, 1990

MCI CORPORATION AND OTI CORPORATION SEEK FCC CONSENT FOR PROPOSED MERGER

PLEADING CYCLE ESTABLISHED

MCI Communications Corporation (MCI) and OTI Corporation (OTI) have filed applications under Sections 214(a) and 310(d) of the Communications Act, 47 U.S.C. 214(a), 310(d), and Section 1 of the Submarine Cable Landing Act of 1921, 47 U.S.C. § 34, requesting Commission approval for the transfer of control to MCI of all licenses and authorizations held or requested by OTI or its subsidiaries, including a Submarine Cable Landing License held by Overseas Telecommunications, Inc., a subsidiary of OTI. These transfers of control will take place as a result of the proposed merger of OTI, MCI and MCI's subsidiary, OTI/MCI. After the proposed merger, MCI will be the parent corporation and OTI will become a wholly-owned subsidiary of MCI. The applications include requests for authority to transfer control of various licenses and authorizations. File No. ENF-91-01 has been assigned to this matter for purposes of reference and coordination, even though separate file numbers have been assigned to the various individual applications for consent to transfer control of the licenses and authorizations in the different services noted below. Except for one license issued through the Private Radio Bureau, all of the following authorizations are issued by the Common Carrier Bureau.

SECTION 214 APPLICATIONS

INTERNATIONAL FACILITIES

File No. I-T-C-91-017-(TC). Application for consent to transfer control from OTI to MCI of international Section 214 authorizations held or requested by OTI Corporation and its wholly owned subsidiary, Overseas Telecommunications, Inc. The file numbers listed below have been assigned to individual applications filed by Overseas Telecommunications, Inc.

ITC-85-052
ITC-86-163
ITC-87-011
ITC-87-033
ITC-87-106
ITC-87-136 (request pending)
ITC-89-086
ITC-89-110
SCL-89-004

SECTION 310 APPLICATIONS

DOMESTIC PUBLIC FIXED RADIO SERVICES

File Nos. 13054-CF-TC-(5)-91. Applications for consent to transfer control from Overseas Telecommunications, Inc. to MCI of five point-to-point microwave radio authorizations controlled or requested by Overseas Telecommunications, Inc. The file numbers listed below have been assigned to individual applications filed by Overseas Telecommunications, Inc.

LICENSEE	CALL SIGN	FILE NO.
Overseas Telecommunications, Inc.	WLM283	1761-CF-P-87 and, 10889-CF-P-88
	WLN511	3140-CF-P-87
	WGW846	3755-CF-P-87 and, 609-CF-MP-89
	WLN281	10890-CF-P-88
	WLN805	3759-CF-P-87

DOMESTIC FIXED-SATELLITE SERVICES

File No. 45-DSE-TC-91. Application for consent to transfer control of one earth station license, call sign E890019, held by Overseas Telecommunications, Inc.

INTERNATIONAL FIXED SATELLITE SERVICES

File No. CSG-91-001-(TC). Application for consent to transfer control from OTI to MCI of the international satellite earth station authorizations held or requested by OTI Corporation. The following file numbers are assigned to eighteen applications for transfer of international earth stations, including three that provide transborder service.

LICENSEE	CALL SIGN	FILE NO.
Overseas Telecommunications, Inc.	KA70	CSG-85-020-P/L
	KA74	CSG-85-052-P/L
	KA83	CSG-86-009-P/L
	KA88	CSG-86-018-P/L and, CSG-88-077-ML
	KA94	CSG-86-049-P/L and, CSG-88-078-ML
	KA99	CSG-86-055-P/L
	KA205	CSG-86-061-P/L and, CSG-87-005-P/L
	KA64	CSG-86-071-P/L
	KA212	CSG-87-010-P/L
	KA239	CSG-87-040-P/L and, CSG-88-070-ML
	KA240	CSG-87-041-P/L and, CSG-88-069-ML
	KA217	CSG-87-056-P/L
	KA215	CSG-87-061-P/L
	KA241	CSG-88-080-P/L
		CSG-90-018-P/L
	(STA)	CSG-90-001-P/L
	E881385	CSG-89-023-ML
	E881386	CSG-89-007-ML
		Pending Requests CSG-88-050-ML through CSG-88-062-ML

PRIVATE RADIO SERVICES

File No. 902064. Application for consent to transfer control from OTI Corporation to MCI of an incidental business radio authorization, call sign KB85873, licensed under Part 90 of the Commission's Rules.

GENERAL INFORMATION

The transfer of control requests listed herein have been found, upon initial review, to be acceptable for filing. The Commission reserves the right to return the applications if, upon further examination, they are determined to be defective and not in conformance with the Commission's Rules or policies.

Parties wishing to comment on this matter may do so no later than **December 17, 1990.** Reply comments should be filed no later than **January 4, 1991.** All filings concerning this matter numbers, should refer to File No. ENF-91-01, as well as references to specific file numbers for the individual applications.

Copies of the applications and any subsequently filed documents in this matter may be obtained from International Transcription Services, Inc., 2100 "M" Street, N.W., Suite 140, Washington, D.C. 20036, (202) 857-3800. The application and documents are also available for inspection and copying in Room 6206, 2025 "M" Street, N.W., Washington, D.C. 20554.

For further information contact Thomas David at (202) 632-4887.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

BC Docket No. 82-763

In re Application of

ELBA DEVELOPMENT CORPORATION (KQTV-TV) St. Joseph, Missouri — File No. BPCT-801114KG

For a Construction Permit for a Major Change

MEMORANDUM OPINION AND ORDER

Adopted: November 2, 1990; Released: November 16, 1990

By the Commission:

1. Before the Commission is a supplemental decision of the Review Board denying Elba Development Corporation's application to modify the existing facilities of station KQTV-TV, Channel 2, St. Joseph, Missouri. Elba *Development Corp.*, 1 FCC Rcd 773 (Rev. Bd. 1986). Great American Broadcasting Company (formerly Taft Broadcasting Company), Meredith Corporation, Scripps Howard Broadcasting Company, and The Hearst Corporation (collectively referred to here as the Respondents) are the licensees of four Kansas City, Missouri television stations, who object to Elba's proposal.[1]

I. BACKGROUND

2. The Board's supplemental decision now before us represents the second time that the Board has considered Elba's application to modify the existing facilities of station KQTV-TV by changing its transmitter site, increasing its transmitter height, and directionalizing its antenna. In a previous decision, the Board, affirming an initial decision, also denied Elba's application, primarily because it concluded that the proposed modifications would create a white area containing 9,936 persons. *Elba Development Corp.*, 96 FCC 2d 393 (I.D. 1983), *aff'd*, 96 FCC 2d 376 (Rev. Bd. 1984). (A white area is an area that does not receive any Grade B television service. Grade B television service is a quality acceptable to the median observer at least 90 percent of the time at 50 percent of locations at the outer limits of the service. *Television Assignments*, 41 FCC 148, 177 ¶ 97 (1952).) The evidence also showed that, as a result of the proposed modification, 5,976 persons would gain a first Grade B television service, 7,208 persons (net) would gain a second Grade B television service, 1,279 persons (net) would gain a third Grade B television service, and the total net gains would be 465,286 persons.

3. After Elba filed an application for review of the Board's 1984 decision, we remanded the proceeding. *Elba Development Corp.*, FCC 84-657 (Jan. 7, 1985), *recon. denied*, FCC 85-254 (May 13, 1985). The Commission instructed the Presiding Judge to determine under a newly adopted policy whether, in light of the availability of alternative video services such as cable, translators, and the viewing of stations beyond their Grade B contours, the white area created by the proposed modification would be *de minimis*.

4. The Commission announced the new policy in *KTVO, Inc.*, 57 RR 2d 648 (1984). The Commission there explained that:

> In recent years it has become apparent that for some purposes the public interest is best served by treating the various forms of alternative service as a single video marketplace. This holds true in the present situation where we must evaluate the service needs of populations on the fringe of a primary television station's service area. Residents of those fringe areas may well have decided that they do not wish to rely on the availability of a single relatively weak Grade B signal. They may therefore have elected to subscribe to cable service or have procured equipment enabling them to receive signals from beyond a station's Grade B contour. Similarly, under these circumstances, translators or low power television, although by nature secondary services, may represent the most realistic option for providing service to these areas. Where this is the case, there is no justification for including the recipients of such alternative service in calculating the extent of white areas.

Id. at 650 ¶ 5.

5. As a result, the *KTVO* proceeding was remanded to the Presiding Judge to determine whether the availability of alternative video services eliminated the white area created or reduced it, to *de minimis* proportions. That remand order referred to *WSET, Inc.*, 80 FCC 2d 233 (1980), in which the Commission held that a white area of 556 persons was *de minimis*. (After remand of the *KTVO* proceeding, the white area created was found to include at most 367 persons, which was considered *de minimis*. *Gillbro Communications Limited Partnership*, FCC 86D-4 (Jan. 27, 1986.)

6. Shortly thereafter, as previously mentioned, the instant proceeding was also remanded for further evidentiary hearings to determine, in light of *KTVO*, whether the white area created by Elba's proposal would be eliminated or reduced to *de minimis* proportions by considering alternative video services. *Elba Development Corp.*, FCC 84-657 (Jan. 7, 1985). Then, in denying reconsideration of its remand order, the Commission offered the following further guidance as to its new policy:

> Our new policy reflects in part our conviction that the public interest is generally served by giving licensees discretion to locate their transmitters to meet the changing needs of their audiences. Nevertheless, we recognize that the loss of existing service cognizable under our Rules is contrary to the public interest. In view of these conflicting factors, we have defined a narrow area of concern: whether the ap-

parent service losses represented by white areas, as indicated by pertinent field intensity contours, represent substantial losses in view of alternative video services available. We wish to emphasize that our intention here is to narrow administrative encroachment into the licensee's discretion, specifically with respect to facility modifications.

Elba Development Corp., FCC 85-254 (May 13, 1985) at ¶ 4.

II. DECISIONS BELOW

7. Following remand, [then] Chief Administrative Law Judge Thomas B. Fitzpatrick again denied Elba's application, holding that Elba had failed to demonstrate that the white area created would be *de minimis*. *Elba Development Corp.*, FCC 86D-34 (May 9, 1986). He did find, however, that two translators proposed by Elba would provide compensatory service to 4,996 persons not otherwise served, thereby reducing the effective white area from 9,936 persons to 4,940. In so doing, Judge Fitzpatrick used the 74 dBu contour rather than the 64 dBu contour (which would encompass a larger area) for determining translator coverage. (Cable systems provided no additional coverage, because they are located within areas also served by the translators.)

8. A 64 dBu contour was used in a study proffered by Elba (prepared by its expert, Professor Stephen Miller), which sought to show that the viewing of alternative video services would reduce the effective white area from 9,936 to no more than 278 if Elba's translators were considered, and 785 if they were not. Because Judge Fitzpatrick found that the Miller study used the wrong contour for calculating translator coverage and that it was also significantly flawed in its design and implementation insofar as it attempted to demonstrate the viewing of stations beyond their Grade B contours, he gave it no weight. In view of the foregoing, Judge Fitzpatrick concluded that Elba's proposed transmitter site move would create a white area of 4,940 persons, which could not be characterized as *de minimis* consistent with Commission precedent.

9. The Board modified the ALJ's supplemental initial decision, although it affirmed the denial of Elba's application. The Board assumed without deciding that the 74 dBu rather than the larger 64 dBu contour was the relevant measure for calculating translator coverage.

10. The Board also agreed with the ALJ that the Miller study was insufficiently reliable. The Board found that: (1) Miller's sampling technique was defective, (2) his survey questions were unduly subjective, and (3) he failed to calculate necessary statistical parameters.

11. Finally, the Board noted that the Respondents had compiled a study of their own prepared by their expert, Norman Hecht, even though the study had not been placed into evidence. In this regard, the Respondents exhanged an exhibit containing the Hecht study but declined to introduce the exhibit at hearing -- evidently after they realized that they could effectively attack the Miller study relied on by Elba and that the Hecht study would help Elba. Thereafter, Elba attempted to introduce the study at the hearing. The ALJ denied Elba's attempt to procure Hecht's testimony on the grounds that Respondents had the right to select their own evidence and that no provision had been made to remunerate Hecht for his testimony. FCC 85M-3879 (Oct. 4, 1985). The ALJ also held that the written study itself could not be relied on because it would not be tested by cross-examination at the hearing. Tr. 1734-35.

12. According to the Board, the parties all agreed that the Hecht study represented a "worst-case" result and that their counsel had so stipulated. Hence, the Board concluded that for its purposes it would assume that the white area created by Elba's proposal could be calculated using the figures presented in the Hecht study. It noted that the Hecht study indicated that only 1,468 persons would lose all service as a result of the proposed modification. Based on its own calculation of the translator coverage using the 74 dBu contour, the Board deduced that this figure is reduced by 407 persons. Consequently, it concluded that Elba's proposal would create an effective white area of only 1,061 persons rather than 4,940 as the ALJ found. Nevertheless, the Board concluded that even a loss of only 1,061 viewers was not *de minimis*.

III. CHANGED CIRCUMSTANCES

13. On June 21, 1988, the Mass Media Bureau, under delegated authority, granted Elba's applications for three additional translator stations to serve the predicted white area. Letter from Roy J. Stewart, Chief, Video Services Division to all counsel (Jun. 21, 1988). Elba had previously received authorization for two translators: on Channel 55 in Bethany, Missouri, and on Channel 57 in Grant City, Missouri. The new translators are for Channel 69 in Athelstan, Iowa, Channel 64 in Gilman City, Missouri, and Channel 53 in Washington Center, Missouri. The Commission's General Counsel thereupon requested the parties to submit comments as to the impact, if any, of the newly authorized translators on the matters at issue in this proceeding. *Elba Development Corp.*, FCC 88I-079 (Aug. 8, 1988).

14. In response (in comments and reply comments filed August 23, 1988 and September 8, 1988), Elba submitted engineering data indicating that its five translators would serve all but 342 persons in the predicted white area, if the 64 dBu contour is used, and all but 1,389 persons, if the smaller 74 dBu contour is used. Elba asserts that this data can be taken into account without the need for further hearings. It also asserts that there is good cause to reopen the record to consider the newly authorized translators.

15. The Respondents and the Bureau answer that the new translators should not change the outcome of the proceeding. (Great American filed comments on August 23, 1988; Great American, the other Respondents, and the Bureau filed reply comments on September 8, 1988.) The Respondents argue that there is no good cause for considering additional, untimely evidence from Elba, especially because further hearings would be necessary to evaluate the evidence. In this regard, the Respondents contend that, if the translators' 74 dBu contours are used, the white area would contain 3,019 persons not 1,389. Moreover, both the Bureau and the Respondents maintain that the 74 dBu contour, not the 64 dBu contour, is the relevant measure of the translators' coverage.

IV. DISCUSSION

16. When the Commission enunciated its new policy and remanded this proceeding for further hearings, it required the parties to litigate a novel question. It is understandable, therefore, that there would be some uncertainty as to the manner in which the evidence relevant to this novel question should be dealt with. With this in mind, we have examined the record to determine whether it is necessary for us to further clarify our intentions by modifying the treatment of the evidence reflected in the decisions of the ALJ and the Board. Upon review of the record before us, we find that the public interest would be served by: (1) taking into account the 74 dBu coverage of Elba's five translators, and (2) taking into account the findings of the Hecht study to the extent that their significance is undisputed. We will direct the parties to submit a further showing necessary to clarify these matters.

A. Translators

17. We first turn to the matter of translators. The record reflects a dispute between the parties as to the proper method for measuring the coverage of Elba's translators. The Respondents and the Mass Media Bureau argue that translator coverage should be measured using the translators' 74 dBu contour, because 47 C.F.R. § 74.707(a)(1)(iii) defines 74 dBu as the contour of these translators protected from interference from translators or other low-power television stations. (Translators are not protected from interference by full power television stations. 47 C.F.R. §§ 74.702(b), 74.703(b).) Thus, the coverage of Elba's translators could potentially be limited to the 74 dBu contour in the future, even if no such limitation was a binding constraint today.

18. Elba, on the other hand, argues that coverage should be measured using the 64 dBu contour, although the Commission's rules accord no special significance to the 64 dBu contours of translators and low-power stations. Elba observes that 64 dBu corresponds to the Grade B contour of UHF stations on the channels involved here and that the Commission generally uses the Grade B contour to measure the adequacy of television coverage in various situations. 47 C.F.R. § 73.683(a). For example, Elba cites *West Shore Cable Co.*, 65 FCC 2d 770, 771 ¶ 3 (1977), which was decided before the adoption of the rule section cited above. In that case, the Commission made reference to a translator's 64 dBu contour in applying the cable signal-carriage rules then in effect. Elba's engineer testified that the 64 dBu contours of Elba's translators are presently interference-free. Tr. 714. (Elba's engineer explicitly addressed only Elba's original two translators. However, his subsequent representations concerning the 64 dBu contours of the three new translators implied that these are also interference-free.)

19. We find that it would be appropriate to credit Elba with the 74 dBu coverage of its translators. We agree with the Respondents and the Bureau that we would not be justified in crediting Elba's translators with coverage beyond their protected contours. Although Elba's translators are apparently not now limited to their 74 dBu contours, we cannot be sure that this will continue to be true given the dynamic nature of the low-power television service. Moreover, we do not wish to create ambiguity as to the status of Elba's translators by suggesting that they may be entitled to protection beyond the contour specified by the rules because of their significance in this case.

20. With this in mind, we turn to the related question of whether we should take into consideration Elba's three new translators. Elba asserts that the authorization of these new translators represents the kind of changed circumstances that justifies further consideration. *See Golden State Broadcasting Corp.*, 102 FCC 2d 797, 800 ¶ 5 (1985). In *Golden State*, the Commission explained that in considering such situations it would weigh the circumstances to determine the proper balance between the doctrine of "administrative finality" and the rule of "changed circumstances." *Id.* at 799 ¶ 3. The Commission found in *Golden State* that the balance favored reopening the record. Several factors supported this result: (1) the evidence involved (the authorization of new service having an impact on a comparative coverage issue) was newly discovered and not discoverable at the time of the hearing through due diligence; (2) the evidence involved was not merely material but represented a change in core circumstances going to the very heart of the case; and (3) the Commission's decision was not final in that it was still subject to reconsideration. *Id.* at 800 ¶¶ 5-6.

21. The Respondents object to considering the new translators on two grounds. First, they argue that Elba could have proposed use of the three translators earlier in the proceeding and did not immediately report in this hearing proceeding its authorization for these translators. Therefore, the Respondents argue that Elba has not been diligent and authorization of the translators should not be considered "newly discovered" evidence. Second, the parties dispute the accuracy of Elba's figures for the population covered by the translators. They contend that further proceedings would be necessary to resolve this discrepancy.

22. In weighing the respective interests of administrative finality and changed circumstances, we believe that for two reasons the balance tilts in favor of taking into account the changed circumstances of Elba's new translators. The factors in this case present equities at least as strong as those in *Golden State* and indicate that the public interest would best be served by reopening the record. First, we have already mentioned the uncertainties occasioned by our enunciating a novel policy in this case. These uncertainties warrant giving Elba more than usual leeway in marshalling evidence on its behalf. The public interest would not be served by reaching an unwarranted result because the parties were understandably uncertain of what evidence should be adduced. Moreover, recognizing such uncertainties does not unduly prejudice the other parties. Elba timely applied for the new translators during the June 22-July 2, 1987 filing window, the first opportunity it had for seeking additional translators after the Commission ruled that evidence of translators was relevant. Second, we are concerned about the possibility that -- if Elba's proposal is rejected because of procedural considerations -- Elba might be induced to file an entirely new proposal leading to a wasteful and duplicative proceeding covering the same ground as the present one. (Under 47 C.F.R. § 73.3519, Elba could file a new proposal 12 months after the effective date of Commission action denying its application or upon final disposition of any judicial appeal.) The public would have to bear the costs of these further proceedings and the attendant delay in resolving the matters at issue.

23. In this respect, Elba claims that its use of five translators would reduce the number of people in the white area to 1,389 if the 74 dBu contour is used. The

Respondents submit a figure for the translators' 74 dBu coverage indicating a white area population of 3,019, more than twice as great as Elba's figure. We do not believe that a further hearing should be necessary to resolve the discrepancy between the parties' respective computations, because the computations involved are entirely mechanical and represent the type of data that is frequently the subject of stipulation.

24. The Respondents' engineer agrees that Elba has correctly represented the location of the pertinent field intensity contours for Elba's translators. Reply Comments of Great American Broadcasting Company, Attachment at 1. The dispute appears to involve computing the population within the depicted areas. As described by Elba's and the Respondents' engineers, this further computation involves: (1) superimposing the field intensity contours on a census map, (2) tabulating the census divisions and portions thereof encompassed by the relevant field intensity contours, and (3) referring to census tables for the population contained in the pertinent divisions. *See* Report of Elba Development Corporation, Attachment at 2-3; Reply Comments of Great American Broadcasting Company, Attachment at 1-2. As we have mentioned, this procedure is entirely mechanical and it should be possible for the parties to agree on a result. We direct the parties to file an appropriate joint stipulation within 30 days of the release date of this memorandum opinion and order. If the parties are unable to reach agreement, they should each file a status report indicating their respective positions in lieu of a joint stipulation. (In the event that the parties are unable to reach agreement, the Office of General Counsel should take approriate measures to direct the preparation of a joint study.)

B. Viewing Surveys

25. Both Elba and the Respondents prepared surveys of the extent to which viewers in the predicted white area could receive television signals beyond their Grade B contours. Both the ALJ and the Board rejected Elba's survey (the Miller study) as unreliable. The Respondents declined to introduce their survey (the Hecht study) into evidence. The Board, however, believed that the parties stipulated to the accuracy (as a "worst-case") of the Hecht study's finding that only 1,468 viewers in the predicted white area would lose all service without KQTV-TV. Based on a computation of translator coverage, the Board reduced this figure to 1,061. 1 FCC Rcd at 774 ¶¶ 5-6. The Respondents and the Bureau now deny that they stipulated to the accuracy of the Hecht study. They also take issue with the Board's further computation of translator coverage, because no such computation appears in the Hecht study.

26. We disagree with the manner in which the Board relied on the Hecht study in concluding that Elba's proposal would create an effective white area containing no more than 1,061 persons. The Respondents' hearing exhibit containing the Hecht study was never submitted into evidence in this proceeding, and both the Respondents and the Bureau deny that they stipulated to its admission or to its accuracy. As the ALJ observed, because the Hecht study was not examined at the hearing, there is no way of knowing to what extent it may be subject to the same type of methodological infirmities affecting the Miller study. Tr. 1735. Additionally, the Hecht study does not take translator coverage into account, rendering the Board's ultimate computation dubious.

27. On the other hand, we share the Board's underlying concerns about the Hecht study. When we remanded this case for further hearing, we intended that a record be developed giving a realistic picture of the extent of the service loss caused by Elba's proposal. We took this approach because it would clearly frustrate the public interest to deprive hundreds of thousands of people of the opportunity to receive a new service if the accompanying loss of existing service were not substantial. It would be undesirable for our ability to make a decision accurately reflecting the public interest to be frustrated because the parties failed to develop a full record of all information in their possession.

28. Additionally, although Elba bears the burden of proving that its proposal is in the public interest, we cannot overlook the extent to which this is an adversarial proceeding. The Respondents' participation in this proceeding has crucially influenced the development of the evidentiary record. This is indicated by the fact that Elba's Miller study was rejected primarily based on evidence furnished by the Respondents and that this may well have been the single most critical ruling in the decisions below. It is therefore only reasonable to evaluate the evidentiary record with the adversarial nature of the proceeding in mind. *See Johnston Broadcasting Co. v. FCC*, 175 F.2d 351, 357 (D.C. Cir. 1949) (because a comparative hearing is adversarial, the Commission may rely on the parties to adduce all relevant factual matters). Modern litigation practice gives a party the opportunity to rely on material developed by its opponents in appropriate circumstances. For example, the Federal Rules of Evidence, which the Commission generally follows in its hearings (47 C.F.R. § 1.351), permits the use of such material in situations closely analogous, if not directly in point, here. Fed. Rules Evid. Rule 801(d)(2) (admission by a party opponent); Rule 804(b)(1) (use of former testimony, including depositions, by an unavailable witness).

29. It would be consistent with these principles to allow Elba to rely on the Hecht study, at least to the extent that the other parties have no basis to challenge its validity or applicability. *See Collins v. Wayne Corp.*, 621 F.2d 777, 780-82 (5th Cir. 1980) (deposition of party's expert could be introduced as admission but was subject to rebuttal). We therefore direct the parties to inform the Commission whether, and to what extent, they would seek to demonstrate that the Hecht study is unreliable, if given the opportunity at hearing.

30. An additional matter may be of critical importance. Even assuming that the Hecht study could be taken into consideration in determining the extent to which stations are viewed beyond their Grade B contours, we agree with the Respondents and the Bureau that the Board did not have an appropriate basis to modify the Hecht study to take into account translator coverage. We are unwilling to undertake such an extension of the Hecht study, except to the extent that the parties do not challenge the appropriateness of the computation. It appears, as the parties contend, that there is no basis in the record to make a precise computation such as the Board did. Nonetheless, the Hecht study may support the assumption that a large majority of viewers not receiving translator service view stations beyond their Grade B contours. Such a conclusion, if sufficiently reliable, may be crucial to the resolution of this case; we therefore find it unnecessary, at this time, to determine whether to characterize a white area of either 1,389 (Elba's estimate based on translator coverage)

or 1,468 (based on the Hecht study) as *de minimis*. The parties should therefore state whether a conclusion could reasonably be drawn from the Hecht study (assuming that it is valid, and in light of any relevant engineering evidence in the record) that persons not served by Elba's translators are likely to have alternative over-the-air service available. They should submit their views on these matters at the same time they submit their joint stipulation on translator coverage.

V. ORDERS

31. ACCORDINGLY, IT IS ORDERED, That the Motions to Strike filed January 28, 1987 by Taft Broadcasting Company and Meredith Corporation and January 30, 1987 by Scripps Howard Broadcasting Company and The Hearst Corporation ARE GRANTED to the extent that Elba argues for the first time in a responsive pleading that the ALJ erred in excluding the Hecht study from evidence; the motions ARE DENIED to the extent that Elba argues in its responsive pleading that the Board was correct in crediting the Hecht study.

32. IT IS FURTHER ORDERED, That, pursuant to 47 C.F.R. § 1.115(g), the Application for Review filed December 22, 1986 by Elba Development Corporation, the Contingent Application for Review of the Decision of the Review Board filed December 22, 1986 by Taft Broadcasting Company and Meredith Corporation, and the Contingent Application for Review of Respondents Scripps Howard Broadcasting Company and The Hearst Corporation filed December 22, 1986 ARE GRANTED to the extent indicated herein and otherwise ARE HELD IN ABEYANCE.

33. IT IS FURTHER ORDERED, That, good cause having been shown, the Petition for Leave to Amend filed August 8, 1988 by Elba Development Corporation IS GRANTED and the associated amendment IS ACCEPTED.

34. IT IS FURTHER ORDERED, That the parties ARE DIRECTED to file the submissions specified in paragraphs 24, 29, and 30 above within 30 days of the release date of this memorandum opinion and order.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The following pleadings are pending before the Commission: (1) an Application for Review filed December 22, 1986 by Elba Development Corporation and Oppositions filed January 21, 1987 by Taft Broadcasting Company (now called Great American Broadcasting Company) and Meredith Corporation, by Scripps Howard Broadcasting Company and The Hearst Corporation, and by the Mass Media Bureau; (2) Contingent Applications for Review filed December 22, 1986 by Taft and Meredith, and by Scripps and Hearst; (3) Oppositions filed January 21, 1987 by Elba; (4) Motions to Strike [portions of Elba's Opposition] filed January 28, 1987 by Taft and Meredith, and January 30, 1987 by Scripps and Hearst; (5) Comments in Support filed February 6, 1987 by the Bureau; and (6) an Opposition filed February 6, 1987 by Elba; and (7) a Petition for Leave to Amend filed August 8, 1988 by Elba.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 88-136

In the Matter of

Local Exchange Carriers' Individual Case Basis DS3 Service Offerings

Petitions for Waiver of the Dark Fiber Filing Requirement

Petition for Emergency Relief

ORDER

Adopted: October 25, 1990; Released: October 26, 1990

By the Deputy Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On August 6, 1990, the Commission released an Order[1] directing, *inter alia*, certain carriers providing "dry," or "dark," fiber services on an individual case basis (ICB) to file tariff revisions that establish generally available, averaged rates for this service not later than 30 days from the release date of the *Reconsideration Order*.[2] In two subsequent Bureau Orders [3] that date was waived and the carriers, including the Bell Atlantic Telephone Companies (Bell Atlantic), the BellSouth Telephone Companies (BellSouth), Southwestern Bell Telephone Company (SWB), and US West Communications (US West), are now required to file general dark fiber rates by November 1, 1990. Those carriers have petitioned the Commission to waive the filing requirement. Oppositions to the petitions for waiver were submitted by various parties.[4] In addition to the waiver petitions, Williams Telecommunications Group, Inc. (WTG) filed a "Petition for Emergency Relief" requesting the Commission to compel SWB to provide certain dark fiber circuits that SWB agreed to provide in contracts which were executed prior to and the same day of the release of the *Reconsideration Order*, respectively. SWB opposed that petition. For the reasons stated below, we deny the waiver petitions and also deny WTG's petition for emergency relief.

II. PLEADINGS

A. Waiver Petitions

2. Bell Atlantic seeks a limited waiver of the Commission's *Reconsideration Order* to the extent it requires Bell Atlantic to file generally available rates to replace its ICB offerings for dark fiber services. Bell Atlantic states that it has not filed any dark fiber ICBs since June 1988, and does not intend to file any future dark fiber cases. With one exception, Bell Atlantic intends to exit the dark fiber market when its ICBs terminate pursuant to the *Reconsideration Order* on August 6, 1991. That one exception is that Bell Atlantic will continue to provide three dark fiber services used in sensitive national security and defense applications. Bell Atlantic believes that continuation of these dark fiber services does not present any concerns regarding unreasonable discrimination because Section 201(b) of the Communications Act, 47 U.S.C. § 201(b), permits separate rate classifications for government services. To the extent it may be required, Bell Atlantic requests a waiver to continue these government dark fiber ICB arrangements. Bell Atlantic Petition at 3 n.7. Bell Atlantic asserts that its withdrawal from the dark fiber market should not adversely affect any customers since alternative access providers exist, customers can build their own facilities, or customers can obtain other Bell Atlantic services to meet their high capacity telecommunications needs. *Id.* at 3-4. Bell Atlantic further asserts that it never held itself out as offering dark fiber services on a general basis. *Id.*

3. BellSouth and SWB filed requests for waiver of the *Reconsideration Order* rate filing requirement, claiming they do not plan to continue providing dark fiber service and therefore should be exempt from filing general rates for dark fiber service. BellSouth Petition at 2; SWB Petition at 3. SWB states that it has decided against offering dark fiber services in the future since they can be offered on a general basis only. SWB Petition at 3. BellSouth and SWB contend that their dark fiber customers will not be adversely affected by their withdrawal from the dark fiber market because the local exchange carriers (LECs) will continue to provide high capacity Special Access services under generally available tariffs. BellSouth Petition at 2; SWB Petition at 3. SWB maintains that since not all LECs provide dark fiber, those LECs who have provided dark fiber service in the past should not be required to continue offering the service. *Id.* at 3-4.

4. US West claims it has seven dark fiber ICBs in its tariff, one of which has been terminated,[5] which are provided over three distinct routes.[6] Errata to US West Petition at 4. US West states that it does not plan to offer dark fiber service after the expiration of the existing dark fiber ICBs. *Id.* Therefore, asserts US West, filing general rates for dark fiber would be meaningless. *Id.* US West generally contests the Commission's finding that it has sufficient experience in provisioning dark fiber service to justify standard rates. *Id.* at 5 n.14.

B. Oppositions

5. MCI argues that, contrary to US West's view, the *Reconsideration Order* clearly requires the LECs in question to file general rates for dark fiber service, and states that US West has not presented any reason to delay the tariffing of dark fiber service. MCI-US West Opposition at 1-2. MCI maintains that the waiver requests violate the Communications Act because Sections 201(a) and 214 of the Act, 47 U.S.C. §§ 201(a), 214, prohibit the petitioners from refusing to provide dark fiber service upon reasonable request or from discontinuing dark fiber service altogether without Commission authorization. *See, e.g., id.* at 3-4; MCI-BellSouth Opposition at 1-3; MCI-Bell Atlantic Opposition at 3; MCI-SWB Opposition at 2-3. MCI observes that earlier in this proceeding BellSouth argued that dark fiber service is separate and distinct from DS3 service, while BellSouth now claims that DS3 and dark fiber are substitutable. MCI-BellSouth Opposition at 3.

6. AT&T generally concurs with MCI's contention that US West should not be allowed to terminate dark fiber service altogether, and asserts that the *Reconsideration Order* did not permit a termination of all dark fiber service. AT&T Opposition at 2-3. However, AT&T asserts that its concerns would be satisfied if the Commission were to allow US West to fulfill its dark fiber ICB obligations upon further reconsideration. *Id.* at 3.[7] AT&T concludes, therefore, that US West's waiver petition should be consolidated and considered in the same proceeding with US West's petition for further reconsideration of the *Reconsideration Order*. *Id.*

7. WTG, like MCI, asserts that a complete withdrawal of dark fiber service by the petitioners would violate Sections 201 and 214 of the Act.[8] WTG Opposition at 2-3. WTG claims that it has paid a monthly recurring rate for "spare fiber" and has requested activation of that spare fiber on an as- needed basis. *Id.* at 3. WTG argues that if SWB discontinues dark fiber service completely, WTG will lose millions of dollars and service provided by its system will suffer. At the same time, SWB will be unjustly enriched through revenues it has received for the lease of spare fiber which WTG has not yet needed to activate. *Id.* at 4. US Sprint also concurs in the Section 214 discontinuance argument advanced by MCI. US Sprint Opposition at 3.

8. Finally, Shell Oil Company (Shell) filed a letter with the Commission requesting that the Commission allow SWB to honor its existing dark fiber contracts. Shell states that it signed a ten year ICB dark fiber contract with SWB in 1988 and has since made approximately $110 million of investment in computing technology on the basis that the dark fiber will be available for the remaining eight year term of the ICB contract.[9]

C. Replies

9. US West maintains that while the *Reconsideration Order* did not permit a termination of all dark fiber service, as AT&T asserts, it also did not constitute a determination that US West must provide dark fiber service. US West Reply at 2. Rather, US West contends, the *Reconsideration Order* found only that US West could not provide dark fiber at ICB rates. *Id.* US West states that AT&T's objections to its waiver will become moot if it is allowed to fulfill its contractual obligations under ICB arrangements, which US West seeks authority to do in its petition for further reconsideration of the Commission's decision to require US West to terminate its dark fiber ICBs. *Id.*

10. US West denies that it is compelled by Section 201(a) of the Act to provide dark fiber service upon a reasonable request, or that it is prohibited from discontinuing dark fiber service by Section 214(a) of the Act. *Id.* at 3. The offering of services or a facility by a carrier on a trial or ICB basis, asserts US West, does not statutorily obligate the carrier to offer the services or facility on a nationwide basis in perpetuity. *Id.* As for MCI's discontinuance argument, US West states that Section 214(a) is inapplicable to service provided by one carrier to another, unless the second carrier can demonstrate service impairment to the public.[10] The carrier submits that if Section 214 authority were required to discontinue dark fiber, there is ample time within the next year to obtain such authority. US West claims that dark fiber facilities are available from a number of vendors, and states that it will continue to provide various other high capacity transport services that can meet the needs of its current dark fiber customers. *Id.* at 4.

11. Bell Atlantic, BellSouth, and SWB also assert that Sections 201 and 214 do not require them to continue offering dark fiber service, or compel them to obtain Commission authorization prior to discontinuing dark fiber service. Bell Atlantic Reply at 3-5; BellSouth Reply at 2-4; SWB Reply at 2-6. Bell Atlantic further asserts that it has not offered dark fiber service since 1988 and claims that its customers have been able to satisfy their high capacity transport needs by using other services and facilities. Bell Atlantic Reply at 2-3 n.6. BellSouth states that while its dark fiber and DS3 services are distinguishable, they are sufficiently substitutable. BellSouth Reply at 2. SWB maintains that its withdrawal of dark fiber ICB tariff revisions which were pending when the *Reconsideration Order* was released was consistent with the Commission's Order and was not a breach of contractual commitment, as contended by WTG. SWB Reply at 7-8.

D. WTG Petition for Emergency Relief

12. WTG makes claims similar to those of the waiver opponents in a pleading styled "Petition for Emergency Relief," filed September 5, 1990. In its petition, WTG requests the Commission to direct SWB to activate as dark fiber services certain spare fibers WTG has been paying for on a monthly basis pursuant to existing ICB arrangements with SWB.[11] WTG Petition for Emergency Relief at 1, 10. SWB filed Tranmittal 2015 to provide dark fiber service at ICB rates incorporating those fibers. The *Reconsideration Order* was released while that transmittal was pending. Consequently, SWB withdrew Transmittal 2015 to comply with the Order. Without the relief it requests, WTG asserts that its customers will suffer catastrophic service disruptions and WTG will be forced to absorb approximately $3 million it has expended to acquire optical terminating equipment to activate spare fibers pursuant to WTG's agreement with SWB. *Id.* at 8-9. In the event the Commission finds that the *Reconsideration Order* precludes the offering of dark fiber service that builds on SWB's existing ICB arrangements, WTG requests a limited, temporary waiver of the Order to activate the spare fibers in question. *Id.* at 7 n.3.

13. On September 19, 1990, SWB filed an opposition to WTG's petition for emergency relief. SWB asserts that WTG's spare fibers comprise a small percentage of the total dark fiber circuits SWB would have to provide pursuant to its agreements with WTG. Consequently, contends SWB, more than activation of the spare facilities would be necessary to provide service pursuant to existing agreements between WTG and SWB for service in Kansas City, Missouri and Dallas, Texas. SWB Opposition at 3. SWB maintains that its withdrawal of Transmittal 2015 (which implemented the Kansas City agreement) was fully consistent with the Commission's *Reconsideration Order*. Moreover, SWB observes that the ICB contracts in question, by their terms, are subject to the rules and regulations of all applicable regulatory authorities, and asserts that WTG is fully aware of the tariff process and its potential for deferring or suspending proposed offerings. *Id.* at 4. SWB notes that WTG was not its only customer which had a pending dark fiber ICB transmittal withdrawn upon the release of the Commission's *Reconsideration Order*. *Id.* at 2. SWB also challenges WTG's arguments invoking Sections 201 and 214. *Id.* at 5-7.

14. In its reply, WTG contends that the Kansas City and Dallas agreements require Southwestern to activate not only its spare fiber but also existing dark fiber between Southwestern central offices that permit a full connection of WTG points of presence. WTG Reply at 2-3. WTG states that Southwestern has complied with similar agreements in the past, and that WTG seeks only to have Southwestern do so again. *Id.* WTG reiterates its claim that WTG customers will be adversely impacted if WTG fails to get the relief it requests. WTG asserts that neither Southwestern, through its other tariffed offerings, nor alternative access providers can satisfy its immediate need for capacity in Kansas City or Dallas. *Id.* at 3-4.

III. DISCUSSION

A. Waiver Petitions

15. The Commission has the authority to waive its rules if there is "good cause" to do so. *See* Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3. In *WAIT Radio v. F. C. C.*,[12] the court held that a waiver is appropriate only if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest. The court further noted that an agency's obligation to give meaningful consideration to requests for waiver of its rules does not contemplate that the agency must or should tolerate evisceration of a rule by waivers. *WAIT Radio*, 418 F.2d at 1159. Citing *WAIT Radio*, the court in *Northeast Cellular Telephone Company v. F. C. C.* affirmed the analysis of *WAIT Radio* and concluded that, if the Commission grants waivers, it must identify and articulate reasonable standards that are predictable, workable, and not susceptible to discriminatory application.[13]

16. The *Reconsideration Order* was unambiguous in its direction that those carriers with sufficient experience in the provision of dark fiber service must file general rates. The Order stated that since these carriers tariffed dark fiber service as ICB offerings, they are required to offer dark fiber service as a generally available service at averaged rates.[14] The *Reconsideration Order* required carriers to file these rates by September 5, 1990, which date was later extended to November 1, 1990. Similarly, the Commission's general policy against ICB rates and in favor of generally available, averaged offerings was clearly articulated in the *ICB Order*. That Order stated that "once exchange carriers have sufficient experience with a service such as the provision of DS3 facilities to permit the development of averaged rates, they must file such rates."[15] To implement this policy, the *ICB Order* directed the affected carriers to convert all existing DS3 ICB services to generally available rates. *ICB Order*, 4 FCC Rcd at 8645.

17. In seeking waivers of the *Reconsideration Order* filing requirement, the petitioners generally argue that they should not have to file general rates for dark fiber service because they do not plan to offer dark fiber service once the existing dark fiber ICB arrangements terminate August 6, 1991. The petitioners also argue that the waivers are justified because their dark fiber customers will not be adversely affected by the discontinuance of service. According to petitioners, these customers can satisfy their high capacity transmission needs through other means, such as by contracting for LEC-provided DS3 offerings or by taking service from an alternative access provider.

18. We conclude that the reasons advanced by the petitioners do not support waivers of the *Reconsideration Order*. First, the petitioners have failed to demonstrate any "special circumstances" which would justify deviation from the Commission's explicit directive. The petitioners make no argument whatsoever that they would suffer hardship by complying with the Commission's directive that they file general dark fiber rates. Nor do the petitioners identify any circumstances that have changed since the Commission's adoption of the *Reconsideration Order*, other than, of course, the elimination of ICBs as an acceptable pricing mechanism. On the other hand, existing dark fiber customers have stated their desire to continue receiving dark fiber service. Some of these customers note that, in relying on the dark fiber service provided by the petitioners, dark fiber customers have invested in the electronic equipment necessary to activate those fibers.[16] Thus, the opposition to the waiver requests by existing dark fiber customers belies the petitioners' contention that these customers will not be affected adversely by discontinuance of dark fiber service. Accordingly, we cannot conclude that the petitioners have demonstrated that the waivers they request would serve the public interest. In these circumstances, the potential for harm to dark fiber customers and, in turn, their end user customers, outweighs any burden the petitioners may face in filing general dark fiber rates, as mandated by the Commission.

19. Second, as the court noted in *WAIT Radio*, an agency's obligation to give meaningful consideration to requests for waiver of its rules does not contemplate that the agency must or should tolerate evisceration of a rule by waivers. *WAIT Radio*, 418 F.2d at 1159. The four carriers seeking waivers are the only four carriers required by the *Reconsideration Order* to file general rates for dark fiber services. Thus, waiving this requirement for these four petitioners would, in fact, completely negate the rule. Accordingly, we conclude that the petitioners have not demonstrated that "good cause" exists for the Bureau to waive the express direction of the Commission that they file generally available, averaged rates for dark fiber service.

B. WTG Petition for Emergency Relief

20. We deny WTG's petition. In essence, WTG is seeking a waiver of the *Reconsideration Order* requirement that SWB no longer provide dark fiber at ICB rates so that SWB can honor its contracts with WTG by filing new ICBs for dark fiber service to WTG. WTG mainly relies on the fact that these agreements were executed prior to the release of the *Reconsideration Order*. However, the date these agreements were executed is irrelevant; it is the effective date of specific tariff provisions that controls. Since the dark fiber ICBs that WTG seeks to implement did not become effective prior to the release of the *Reconsideration Order*, the underlying agreements to activate spare fiber as dark fiber priced at an ICB rate are in direct conflict with stated Commission policy and directives. Carving exceptions out of the Commission's *Reconsideration Order* would render policies and findings of that Order meaningless.

21. Moreover, the claimed urgency of the relief sought by WTG is somewhat confusing. The tariff filed by SWB to implement the earlier of the two agreements WTG seeks to enforce, termed the "Kansas City Agreement" by WTG, was not submitted until August 2, 1990. Therefore, based on the maximum 90-day notice period, that tariff

would not have become effective until October 31, 1990. In these circumstances, WTG's claims that it will be forced to terminate, curtail, or refuse service to existing and potential customers by the end of September appears dubious. Moreover, the latter agreement WTG seeks to enforce, termed the "Dallas Agreement" by WTG, was not executed until August 6, 1990, the same day the *Reconsideration Order* was released. Thus, tariff revisions implementing this agreement could not even have been filed until after SWB was ordered by the Commission to terminate its dark fiber ICBs and file general rates.

22. Furthermore, in light of our action denying the petitions for waiver of the filing requirement, WTG will be able to continue to obtain dark fiber from SWB under its general dark fiber offering once the tariff revisions implementing the averaged rates take effect. The Commission contemplated that there would be some "lag time" in which new dark fiber ICBs could not be filed and general dark fiber rates would not yet be available. We conclude that, given the facts in the record before us, our denial of the waiver petitions, and the resulting filing obligations of the affected parties, there is no basis for concluding that WTG will suffer certain and substantial harm. We further conclude, based on the present record, that the lag time prior to the effective date of general dark fiber rates is not unreasonable in view of the important public interest concerns underlying the elimination of inherently discriminatory rates produced by ICB pricing.[17] In addition, we note that the spare fiber that WTG has been purchasing on a monthly basis will still be useful since those facilities can be activated once SWB's general dark fiber offering becomes effective.

IV. CONCLUSION; ORDERING CLAUSES

23. In sum, we conclude that the petitioners have proffered insufficient justification to grant the requested waiver of the *Reconsideration Order* filing requirement, and that WTG's petition for emergency relief has not been sufficiently supported.

24. Accordingly, IT IS ORDERED that the petitions for waiver of the dark fiber tariff filing requirement filed by the Bell Atlantic Telephone Companies, the BellSouth Telephone Companies, Southwestern Bell Telephone Company, and US West Communications ARE DENIED.

25. IT IS FURTHER ORDERED that the oppositions and comments filed by American Telephone and Telegraph Company, MCI Telecommunications Corporation, US Sprint Communications Company Limited Partnership, and Shell Oil Company, against the petitions for waiver of the dark fiber tariff filing requirement ARE GRANTED to the extent indicated herein and otherwise ARE DENIED.

26. IT IS FURTHER ORDERED that the petition for waiver of the requirement that all individual case basis arrangements be terminated, filed by the Bell Atlantic Telephone Companies for its government ICBs, IS DISMISSED as moot.

27. IT IS FURTHER ORDERED that the petition for emergency relief filed by Williams Telecommunications Group, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Carl D. Lawson
Deputy Chief (Policy)
Common Carrier Bureau

FOOTNOTES

[1] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, FCC 90-270, Memorandum Opinion and Order on Reconsideration, 5 FCC Rcd 4842 (1990) (*Reconsideration Order*).

[2] *Reconsideration Order*, 5 FCC Rcd at 4845.

[3] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Order, 5 FCC Rcd 5420 (Com.Car.Bur. 1990); Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Order, DA 90-1305 (Com.Car.Bur., released Sept. 28, 1990).

[4] The parties who filed oppositions to the waiver petitions include: American Telephone and Telegraph Company (AT&T), against US West; MCI Telecommunications Corporation (MCI), against all petitions; and Williams Telecommunications Group, Inc. (WTG) and US Sprint Communications Company Limited Partnership (US Sprint), against Southwestern Bell. Shell Oil Company filed comments regarding its dark fiber ICB arrangement with Southwestern Bell.

[5] The terminated dark fiber ICB was removed from US West's tariff on October 20, 1990. *See* US West Communications Tariff F.C.C. No. 1, Transmittal No. 110, filed Sept. 5, 1990.

[6] In its initial waiver filing, US West claimed to have nine dark fiber ICBs in its tariff, one of which has been terminated, leaving eight remaining dark fiber ICBs provided over three distinct routes. US West Petition at 4 n.12. In a subsequent filing, US West attributes its original representation to an inadvertent error in identifying dark fiber ICBs and states that acceptance of the errata correcting the data will not prejudice any party. Errata to US West Petition at 1-2.

[7] AT&T is referring to a petition for further reconsideration of the *Reconsideration Order* filed by US West on September 5, 1990.

[8] WTG cites Chastain v. AT&T, 43 FCC 2d 1079 (1973).

[9] Letter from J.J. Marsh, Shell Oil Company, to Secretary, Federal Communications Commission, filed Sept. 18, 1990. Although the letter is essentially a request for further reconsideration of the Commission's decision to require termination of existing dark fiber ICBs in the *Reconsideration Order*, we will consider it in the instant proceeding because it is relevant to the issue of discontinuance and the potential adverse impact it may have on dark fiber customers.

[10] *Id.* at 4 (*citing* Western Union Telegraph Co., 74 FCC 2d 293, 295-96 (1979); Lincoln County Telephone System, Inc., 81 FCC 2d 328, 331-32 (1980)).

[11] Specifically, WTG states that it will be forced to terminate, curtail, or refuse service to existing and potiential customers by "month's end" unless the Commission directs SWB to activate WTG's dark fiber facilities that WTG and SWB agreed would be activated prior to the release of the *Reconsideration Order*. The facilities in question would include two fibers in addition to those that were to be activated pursuant to Transmittal 2015, which was withdrawn by SWB. *See* WTG Emergency Petition at 5.

[12] 418 F.2d 1153 (D.C. Cir. 1969).

[13] Northeast Cellular Telephone Company, L.P. v. F.C.C., 897 F.2d 1164, 1166 (D.C. Cir. 1990).

[14] *Reconsideration Order*, 5 FCC Rcd at 4845.

[15] Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, Memorandum Opinion and Order, 4 FCC Rcd 8634, 8642 (1989) (*ICB Order*).

[16] *See, e. g.*, WTG Opposition at 4; WTG Petition for Emergency Relief at 8; Shell Comments at 1.

[17] WTG, of course, is free to make a showing that it would be unduly burdened by the lag time before SWB's general rates take effect. We would endeavor to address such a showing expeditiously in a subsequent proceeding.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications — Transmittal Nos. 2404 and 2535

Revisions to Tariff F.C.C. No. 2

ORDER

Adopted: October 31, 1990; Released: October 31, 1990

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. By Transmittal Nos. 2404 and 2535, AT&T Communications (AT&T) proposes to change certain tariff provisions pertaining to termination of its 800 service term plans. Ad Hoc Telecommunications Users Committee (Ad Hoc) and MCI Telecommunications Corporation (MCI) filed petitions to reject or suspend and investigate Transmittal 2404; Ad Hoc and Mid-Com Consultants, Inc. (Mid-Com) filed petitions to reject or suspend Transmittal 2535. AT&T filed replies to these petitions. The tariff transmittals are scheduled to become effective on November 1, 1990. For the reasons given below, we grant the petitions and reject Transmittals 2404 and 2535.

II. BACKGROUND

2. Generally, AT&T's Location Specific Term Plan and Customer Specific Term Plan for 800 Service under these plans provides discounts to customers who commit to subscribe to AT&T 800 service for a three-year service term. Customers of these plans who cancel service before the term ends must pay termination liability charges, unless the customer orders a new term plan or moves its traffic from one plan to another plan with equal or greater monthly revenue commitments. Discontinuance of the former term plan and installation of the new term plan must be done concurrently.

3. Under Transmittals 2404 and 2535, a customer would be excused from termination liability only if the same customer initiated the existing term plan and the AT&T term plan to which it is moving its 800 service traffic. AT&T filed Transmittal 2535 to define certain language used in Transmittal 2404.[1] Because AT&T views these transmittals as "clarifying" its existing tariff without changing it, AT&T did not initially file any support information required by the Commission's rules or any other justification for the revisions.[2]

III. PLEADINGS

A. Transmittal 2404

1. Petitions

4. MCI contends that AT&T's entire 800 service term plan constitutes an unjust and unreasonable practice under Section 201(b) of the Communications Act, 47 U.S.C. § 201(b), because AT&T is leveraging its dominant position in the 800 service market by tying that service to a service subject to greater competition. MCI Petition at 2, *citing* American Telephone and Telegraph, 5 FCC Rcd 3833 (Com.Car.Bur. 1990).

5. Ad Hoc objects to the application of the changes to current customers who have already committed to multi-year service terms. According to Ad Hoc, AT&T is changing the terms of the agreement under which customers subscribed to its 800 service term plan. Ad Hoc contends that changing preexisting long-term service arrangements is contrary to Commission policy which favors maintaining current tariff terms and conditions over the carrier's right to adjust its tariff to meet the carrier's business needs and objectives. According to Ad Hoc, a carrier must meet the "substantial cause for change" test in order to justify a change to an existing long-term service arrangement. Ad Hoc Petition at 3, *citing* RCA American Communications, Inc., 84 FCC 2d 353, 358 (1980) (*Investigation Order*), 86 FCC 2d 1197, 1201 (1981) (*Rejection Order*), 2 FCC Rcd 236 (1987) (*Reconsideration Order*) (*RCA Americom Decisions*).

2. AT&T Reply

6. In response, AT&T states that these tariff revisions "merely clarify the termination provisions" applicable to its Location Specific Term Plan and Customer Specific Term Plan to make it explicit that the same customer must have initiated both the existing term plan and the term plan to which it is moving its 800 service traffic in order to cancel the first term plan without liability. AT&T Tr. 2404 Reply at 1. AT&T maintains that Ad Hoc's reliance on the *RCA Americom Decisions* is misplaced. According to AT&T, because the changes proposed in Transmittal 2404 are merely clarifications, it need not meet the substantial cause for change test. *Id.* at 2.

3. Ad Hoc Response

7. At the request of the Tariff Division, Ad Hoc filed an additional pleading, styled "Response to Reply of AT&T." Ad Hoc argues that AT&T did not file a mere clarification, but rather is introducing a limitation to the existing tariff which presently contains no suggestion of such a limitation. Ad Hoc Response at 2.[3] In addition, Ad Hoc asserts that AT&T cannot alter a long-term service agreement without cause despite language in the service order agreement that its terms may be modified "from time to time." *Id.* at 3-5. Ad Hoc asserts that, in the *RCA American Decisions*, the Commission found that, despite the fact that RCA Americom's tariff contained some indication that RCA Americom had reserved the right to modify its tariff, RCA Americom was still required to show substantial cause for changing its long term service agreement. *Id.* at 3-4, *citing Investigation Order*, 84 FCC 2d at 359.

B. *Transmittal 2535*

1. Petitions

8. Mid-Com Communications, Inc. (Mid-Com) and Ad Hoc filed petitions to reject or suspend and investigate Transmittal 2535. Mid-Com asserts that the revisions are

unreasonable under Section 201(b) of the Communications Act, 47 U.S.C. § 201(b), because AT&T is preventing Mid-Com from reselling AT&T services. According to Mid-Com, AT&T's revisions to its 800 service term plan would make it improbable that any customer would switch to a Mid-Com aggregation plan using AT&T 800 term plan services because the penalties the customer would incur would exceed any discounts Mid-Com's plan could offer. Mid-Com Petition at 2. Further, Mid-Com alleges that the revisions are discriminatory in violation of Section 202(a) of the Communications Act, 47 U.S.C. § 202(a), because stand-alone AT&T term plan customers are treated differently from AT&T term plan customers who aggregate. *Id.* at 3. Finally, Mid-Com asks that AT&T be required to show substantial cause for the proposed changes in accordance with the *RCA Americom Decisions*. *Id.* at 3 n.2. Ad Hoc's petition against Transmittal 2535 merely incorporates by reference the pleadings it filed with respect to Transmittal 2404.

2. *AT & T Reply*

9. In its reply, AT&T states *inter alia*, that while it does not agree with Ad Hoc that a "substantial cause for change" showing is required here, AT&T nonetheless furnishes one. According to AT&T, when it initiated the existing termination provisions, AT&T determined that its projected 800 term plan customer base --multi-location corporations -- would require the flexibility to consolidate their term plan traffic as their business needs change. AT&T Tr. 2535 Reply at 7. However, AT&T maintains that these plans were used by resellers that aggregate the 800 traffic of third parties. AT&T asserts that as a result, these customers have manipulated AT&T's term plan tariffs to permit waiver of termination liability even where unaffiliated term plan customers combine their plans. *Id.* AT&T claims that if it were to permit customers to combine term plans owned by third parties under their existing term plan without requiring termination charges for the canceled term plans, AT&T would lose the term plan minimum revenue commitments. To demonstrate the extent of its potential revenue commitment loss, AT&T provided the number and total annual revenue of AT&T's 800 term plan customer base which AT&T claims would be subject to loss in revenue commitment to AT&T absent these tariff revisions. *Id.* at 8-9 and Attachment B.

3. Oppositions

10. At the Bureau's request, Ad Hoc and Mid-Com filed responses to AT&T's reply in order to address AT&T's substantial cause showing, made for the first time in that pleading. Ad Hoc maintains that AT&T's showing is deficient because AT&T's only argument is that unless the proposed changes are allowed to become effective, AT&T will make less money than it otherwise would. Ad Hoc Response at 7. However, says Ad Hoc, AT&T does not discuss the likely impact of such revenue reduction on AT&T's profits. *Id.* at 8. Furthermore, Ad Hoc repeats its assertion that RCA Americom had language in its tariff which contemplated changes in long term agreements (and cushioned the impact by permitting customers to terminate in the event of a rate increase) and the Commission nonetheless required RCA Americom to make a substantial cause for change showing to alter the terms of its long term service agreements. *Id.* at 5, *citing Investigation Order*, 84 FCC 2d at 359.

11. Mid-Com asserts that these revisions are clearly not clarifications but "a complete reversal" of AT&T policy. Mid-Com quotes language from an internal AT&T memorandum to its own sales staff in which AT&T states that its policy is to allow end users to combine their traffic with an unaffiliated group of users without incurring penalties. Mid-Com Response at 2. Mid-Com, like Ad Hoc, finds AT&T's substantial cause for change showing to be unpersuasive. According to Mid-Com, AT&T initially allowed large customers and aggregators to purchase its services in bulk at discount rates in order to respond to competition from MCI and US Sprint. Mid-Com maintains that AT&T then increased its discounts to encourage aggregation, on the theory that some revenue (from the aggregated plans) was better than no revenue (due to large scale loss of its customers to its competitors). *Id.* at 5-6. However, Mid-Com asserts that AT&T does not explain why this approach is no longer acceptable. *Id.* at 6.

12. Mid-Com further argues that AT&T has overstated its potential revenue losses, in assuming a 100 percent loss in revenues. Mid-Com believes that this assumption ignores the fact that the customer would still be using AT&T's services, although at a better price, and that it is better for AT&T to retain customers on its network than lose them entirely to its competitors. Mid-Com argues that AT&T's sole motivation in filing these revisions is to stop aggregators. *Id.* at 6-7.[4]

C. *AT & T Price Cap Information*

13. Finally, on October 3, 1990, AT&T supplied the supporting information required by the price cap rules in response to a Bureau request. In its submission, AT&T states that it has analyzed the effect of the proposed tariff revisions on the base demand. According to AT&T, the tariff revisions are intended to maintain the status quo of its 800 term plan customers. AT&T has identified no demand change to the base demand associated with these revisions. Therefore, AT&T states, no change in revenue for the term plans will occur, and the Actual Price Index and the Service Band Indices will not be affected. On October 12, 1990, AT&T furnished the actual index information for these transmittals.[5]

IV. DISCUSSION

14. We disagree with AT&T's claim that it is merely "clarifying" existing tariff provisions; rather, we conclude that Transmittals 2404 and 2535 would make major changes to AT&T's 800 service term plan, which is a long-term service arrangement. The *RCA Americom Decisions* establish that a carrier must demonstrate substantial cause for changes in long-term service arrangements. This special showing for changes in long-term agreements was not changed by the Price Cap Rules.[6] Indeed, the Commission explicitly discussed the *RCA Americom Decisions* in the *AT & T Price Cap Order* and adopted the substantial cause test for evaluating above-band rates.[7] AT&T has failed to provide a persuasive showing of substantial cause for the instant changes. Therefore, as we discuss in more detail below, these tariff transmittals are rejected for this reason.

15. The specific language at issue in these transmittals concerns the conditions under which a customer may cancel an existing 800 service term plan and switch to another term plan without incurring termination liability. By arbitrarily classifying these transmittals as "clarifications" as opposed to substantive regulation changes for long-term plans, AT&T takes the position that it need not supply any justification. We find that these tariff revisions

are substantive modifications and not "clarifications." The transmittals would establish additional restrictions on existing 800 service term customers who wish to merge their plans. The existing tariff language that AT&T seeks to modify with these transmittals does not suggest that the move from one term plan to another can be made without incurring any termination liability only if the same customer has initiated both plans. Nor does it explain that the phrase "the new term must be of equal or greater value" than the existing plan means that the new plan must have time and revenue commitments of equal or greater value than the plan being terminated. Moreover, restrictions on termination of existing plans and initiation of new plans are significant aspects of a long term service plan and cannot be changed without impact on the customer.

16. AT&T must meet the substantial cause for change test adopted in the *RCA Americom Decisions*. In the *RCA Americom Decisions*, the carrier filed major changes to its long-term service contracts, including termination penalties. The Commission suspended the filing and designated for investigation the question of the proper standard for evaluating the reasonableness of changes to long-term service contracts. In order to balance customers' legitimate expectations of stability against the carrier's business needs and objectives, the Commission concluded that a carrier must demonstrate substantial cause for change if it seeks to modify long-term offerings.[8] The Commission eventually applied the substantial cause for change test and determined that RCA Americom had met the test by showing that unforeseeable cost increases, particularly the unexpectedly high inflation that occurred between 1978 and 1981, provided the carrier with substantial cause for the rate increases. *Reconsideration Order*, 2 FCC 2d at 2367.

17. The Commission's adoption of the AT&T Price Cap Rules did not affect the applicability of the substantial cause test. The Price Cap Rules govern the support requirements for changes in rate levels or the establishment of rate levels for new or restructured services. The rules do not purport to eliminate existing Commission requirements for demonstrating the reasonableness of new or changed rate structures, *i.* e., terms and conditions. Accordingly, while AT&T is required to support the instant transmittals with the requisite display of impact on price cap indices, AT&T continues to be subject to the requirement that it demonstrate substantial cause for changing the terms and conditions for long-term service contracts, at least insofar as those changes apply to existing customers of the long-term service.

18. AT&T has not made a showing that is sufficient to meet the substantial cause for change test.[9] AT&T's explanation for these changes is that they are necessary to prevent term plan customers from joining or "rolling over" into the plans of other customers and escaping termination liability charges. AT&T does not argue that it is harmed by the loss of the termination liability revenues, however, nor could it without proffering some explanation as to why the same loss does not compel similar treatment of single customer roll-overs. AT&T instead makes two assertions as its substantial cause showing.

19. First, AT&T states that, when existing customers combine with another customer's plan, AT&T loses the minimum revenue commitments that would otherwise apply individually to the plans of the merging customers. Those customers are instead subject to the minimum revenue commitment applicable to the plan they join, with no offsetting revenue commitment increase for that plan. AT&T Transmittal 2535 Reply at 8. For example, says AT&T, five customers with plans that have $5,000 minimum revenue commitments can combine with another customer that is taking a plan with a $50,000 minimum revenue commitment. Under the existing tariff provisions, which would continue to apply to single customer consolidations, the $50,000 minimum revenue commitment then applies to all six customers and is not increased to $75,000. AT&T claims that it is injured by the loss of a minimum revenue commitment from each customer who "rolled over" since remaining term plan customers could drop $25,000 of its traffic and still meet the revenue commitment.

20. AT&T is silent, however, as to how it will be injured if existing customers are no longer subject to their previous minimum revenue commitments but are subject to the new minimum instead. AT&T could have argued, for example, that the individual minimum revenue requirements recover some fixed cost of serving a customer that will go unrecovered if individual customers do not pay the minimum or if the new minimum is not increased. AT&T makes no such argument, nor does it address the question of why its objection to customers "trading down" their minimum revenue requirements does not apply with equal force to single customer consolidations.

21. AT&T's second assertion in support of its substantial cause claim is a conclusory statement that it will lose revenues if the transmittal does not take effect. We note that AT&T is claiming that its revenues will be reduced; it is *not* claiming that it will fail to recover its costs or that net revenues will be negative. It does not provide any explanation of how it will lose revenues when customers are continuing to take AT&T service, albeit at the lower rate of the term plan to which they convert. AT&T does *not* argue, for example, that usage levels will drop, decreasing its usage revenues (and usage levels may very well increase since customer demand may be stimulated by the lower rate of the plan to which they convert). To the extent that AT&T is arguing that it will make less money when customers take advantage of the lower tariffed rate in the plan to which they convert, it has failed to identify some injury to AT&T, that outweighs the existing customers' legitimate expectation of stability and AT&T has failed to justify the disparate treatment of single customer consolidations.

V. CONCLUSION

22. In sum, AT&T has failed to demonstrate substantial cause to justify its proposed changes to its long-term 800 service term plans. Its claim of potential loss in revenues does not satisfy the standard as set out in the *RCA Americom* decisions. Accordingly, we reject AT&T Transmittals 2404 and 2535.[10]

VI. ORDERING CLAUSES

23. Therefore, IT IS ORDERED that the petitions for rejection or suspension of AT&T Communications Tariff F.C.C. No. 2, Transmittal No. 2404, filed by Ad Hoc Telecommunications Users Committee and MCI Telecommunications Corporation ARE GRANTED.

24. IT IS FURTHER ORDERED that the petitions for rejection or suspension of AT&T Communications Tariff F.C.C. No. 2, Transmittal No. 2535, filed by Ad Hoc Telecommunications Users Committee and Mid-Com Consultants, Inc., ARE GRANTED, to the extent provided herein.

25. IT IS FURTHER ORDERED that AT&T Communications Tariff F.C.C. No. 2, Transmittal Nos. 2404 and 2535 ARE REJECTED.

26. IT IS FURTHER ORDERED that AT&T Communications SHALL FILE revisions removing the rejected material no later than five working days from release of this Order. These revisions should be filed to become effective on not less than one day's notice.

27. IT IS FURTHER ORDERED that for this purpose, Special Permission No. 40-1161 is assigned and Sections 61.56, 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, 61.59, are waived.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Firestone
Chief, Common Carrier Bureau

FOOTNOTES

[1] AT&T filed further revisions in Transmittal 2535, filed September 5, 1990, to define "a term plan of equal or greater value" to which Transmittal 2404 requires customers to move. Transmittal 2535 provides that where a customer is either discontinuing its current term plan or merging the plan with a new term plan, the new term plan must have monthly revenue and term commitments equal to or exceeding the original monthly revenue commitment. Discontinuance of the former term plan and initiation of or movement to the new plan still must be done concurrently, and both plans still must be initiated by the same customer.

[2] AT&T subsequently filed price cap information in response to an informal request from the Common Carrier Bureau. *See* infra.

[3] MCI was not asked to file another pleading because it did not raise the substantial cause issue in its pleading.

[4] AT&T then filed a pleading styled a "Further Reply of AT&T" in response to the pleading filed by Ad Hoc. This pleading is unauthorized and was unsolicited. Accordingly, we do not consider it in this Order.

[5] Letter from C.E. Link, Administrator - Rates and Tariffs, AT&T, to Chief, Tariff Division, Oct. 12, 1990.

[6] Sections 61.42 - 61.49 of the Commission's Rules, 47 C.F.R. §§ 61.42 - 61.49.

[7] Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and Second Further Notice of Proposed Rule Making, CC Docket No. 87-313, 4 FCC Rcd 2873, 3103-06, paras. 466-78 (1989).

[8] *Rejection Order*, 86 FCC 2d at 1201.

[9] AT&T in fact has maintained throughout this proceeding that it is not even required to make any such showing because of its characterization of the "clarifying" nature of the tariff changes made by the pending transmittals. AT&T has adhered to this view even as it has belatedly come forward with its substantial cause showing to support Transmittal 2404. *See* para. 9, *supra*.

[10] We do not address the question of whether AT&T made an adequate showing under the Commission's Price Cap Rules because we are rejecting the transmittals on other grounds.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
October 11, 1990
Released: October 11, 1990

Martin J. Gaynes, Esq. 8940-AG
Wilkes, Artis, Hedrick & Lane
1666 K Street, N.W.
Washington, D.C. 20006

Dear Mr. Gaynes:

This is in reference to your request of August 31, 1989, filed on behalf of the general partners of Queen City III Limited Partnership (Queen City III), licensee of station WKBW-TV, Buffalo, New York, for the issuance of a tax certificate, pursuant to Section 1071 of the Internal Revenue Code of 1986 and *Minority Ownership in Broadcasting*, 92 FCC2d 849, 857 (1982).

As background, you note that the general partners for whom a tax certificate is sought were the initial stockholders of Queen City Broadcasting, Inc. (Queen City), a minority-controlled corporation formed in 1985 for the purpose of acquiring WKBW-TV. No minority individual owns as much as 50% of the corporation. On January 2, 1986, Capital Cities Communications, Inc. sold WKBW-TV to Queen City Broadcasting of New York, Inc., a wholly owned subsidiary of Queen City. On June 29, 1989, virtually all of the Queen City shareholders (98%) became general partners in Queen City III by trading their respective shares for cash and general partnership units. Further, as a result of bringing in a new limited partner, who purchased 45% of the equity interest in Queen City III, the equity interests of those stockholders who became general partners were diluted by 45%. Thus, you contend that those stockholders/general partners, including minorities, who provided start-up capital to Queen City should receive a tax certificate for the partial divestiture of their respective interests resulting from this dilution.

In *Minority Ownership in Broadcasting*, above, the Commission stated that "the use of tax certificates as creative financing tools" will provide minorities with significant access to financing, thus promoting the important policy of minority ownership. *Id.* at 857. Accordingly, the Commission extended the availability of tax certificates to initial investors providing start-up capital to minority-owned entities and to investors purchasing interests within the first year of licensing. To be eligible, however, the Commission provided that sale of equity interests must not reduce minority ownership and control in the entity below 51 percent. *Id.* The requirement that at least 51% minority control remain after the transaction prompting the certificates was not meant to preclude "consideration of cases whereby 'minority involvement would have been significant enough' to justify the issuance of a tax certificate in the first instance." *Id.* at n. 39. This latter provision was generally intended to recognize the eligibility of entities in which the minority party was the general partner and a substantial (at least 20%) but not controlling equity investor.

In *R. Clark Wadlow, Esq.*, 4 FCC Rcd 5262 (1989), the minority-controlled entity was controlled by a single person, who owned 80 percent of the voting stock of the entity. We denied his request for a tax certificate based on his providing start-up financing to the entity by his purchase of stock in the entity. We stated that, under the circumstances, no tax certificate should be issued to the controlling minority owner, since after selling his entire interest the entity would no longer be minority controlled and the objectives of the minority ownership policy would be frustrated.

Here, we find the situation and circumstances different. In particular, each investor equally paid full value for the initial interest and no single individual has as much as a controlling interest. More importantly, even though minority ownership has been diluted by 45 percent, the licensee remains under the control of minorities, who hold, in the aggregate, a 55 percent interest. The objective of the Commission's tax certificate policy is to increase the number of minority-owned stations; that is, stations in which the majority of the ownership interest is held by a minority or a group of minorities. Encouraging initial investments by minorities, as well as by others, in entities that are being formed to acquire broadcast media interests as minority-controlled applicants clearly furthers this objective. To hold otherwise would create a disincentive for minorities to come together and invest in an entity that they collectively will control. Accordingly, under the circumstances in this case, we believe that our policy set forth in *Minority Ownership in Broadcasting*, above, should be read to permit the issuance of tax certificates to the initial investors in Queen City.

In view of the foregoing, we find that the Commission's policy of fostering minority ownership will be served and that, therefore, a tax certificate should be issued. The enclosed tax certificate certifies that those identified investors, who acquired stock interests no later than the end of the first year after WKBW-TV's license was issued to Queen City Broadcasting of New York, Inc. are entitled to a tax certificate. This letter was adopted by the Commission on September 21, 1990.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

CERTIFICATE ISSUED BY THE FEDERAL COMMUNICATIONS COMMISSION PURSUANT TO SECTION 1071 OF THE 1986 INTERNAL REVENUE CODE (26 U.S.C. SECTION 1071)

On January 2, 1986, Capital Cities Communications, Inc. sold WKBW-TV, Buffalo, New York, to Queen City Broadcasting of New York, Inc., a wholly owned subsidiary of Queen City Broadcasting, Inc., an entity controlled by a group of minorities, none of whom held as much as a controlling interest. On June 29, 1989, virtually all of the shareholders (98%) in Queen City Broadcasting, Inc. became general partners in Queen City III Limited Partnership by trading their respective shares for cash and general partnership units. The limited partnership would

operate the television station. As a result of bringing in a new limited partner, which purchased 45% of the equity in the limited partnership, the equity interests of those stockholders, who became general partners, were diluted by 45%.

It is hereby certified that those shareholders who acquired stock in Queen City Broadcasting, Inc. provided start-up financing pursuant to the Commission's policy of fostering an increase in minority ownership of broadcast facilities. In that policy statement, the Commission stated that it would issue tax certificates to those initial investors who provide start-up financing, no later than the end of the first year after the station's license was issued or acquired. *See Minority Ownership in Broadcasting*, 92 FCC2d 849, 857 (1982).

This certificate is issued pursuant to the provisions of Section 1071 of the 1986 Internal Revenue Code.

In Witness whereof, I have hereunto set my hand and seal this 11th day of October, 1990.

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

RAO LETTER 12
Revised October 19, 1990

Released: October 23, 1990

Responsible Accounting Officers

Re: Attestation Audits pursuant to the Joint Cost Order and Joint Cost Reconsideration Order (CC Docket 86-111)

In CC Docket No. 86-111 the Commission established accounting safeguards which govern the allocation of telecommunications common carriers' costs between their regulated and nonregulated activities and the treatment of transactions between these carriers and their affiliates. Among these safeguards is the requirement that each Tier 1 local exchange carrier must have an audit performed annually by an independent auditor. The purpose of the audit is to provide a positive opinion on whether the carrier's cost allocation methodologies used in preparing reports to the Commission are in conformity with the cost allocation manual approved by the Commission and whether the reported results are an accurate application of those methodologies.

Based on our review of the results of these audits of the carriers' 1988 and 1989 operations, we have concluded that additional work in examining source data and testing of allocation procedures and reported results should be performed in audits of the carrier's 1990 operations in order to fully satisfy the Commission's requirements. The assurance the Commission seeks is essentially the same as that provided with a financial statement audit engagement. The financial statement audit engagement results in an opinion on whether the financial statements present fairly, in all material respects, the financial results of a company's operations. Among other things, the professional standards of field work for financial statement audit engagements provide additional assurance by specifically requiring auditors to obtain evidential matter through inspection, observation, inquiry, and confirmation to afford a reasonable basis for the statements under examination, and an evaluation of internal controls when those controls are relied upon in determining the extent of auditing procedures. We will rely on the professional judgment of the independent auditor for determinations of materiality as it relates to the scope of the audit; however, we expect that during the course of an audit, the discovery of any error or omission in excess of $1 million will result in a correction of the reported results.

We hereby direct the carriers to have these audits performed and submit the resulting opinion letters with the FCC Reports 43-03 covering 1990 operations, which are due at the Commission on April 1, 1991. The auditors' opinions shall apply to all data shown in columns (b) through (j) of the FCC Report 43-03, ARMIS Joint Cost Report.

In order to facilitate the submission of the opinion letter, we have attached a sample letter which is designed to provide the assurance we are seeking. The sample letter is intended to be used as a guide and may vary according to the circumstances. Independent auditors should not view themselves as bound by the literal format of the sample letter.

This Responsible Accounting Officer letter supersedes RAO Letter 12 as issued July 18, 1988 and is issued under Section 0.291 of the Commission's rules. Application for review under Section 1.115 of the Commission's rules must be filed within 30 days from the date of public notice of this action. *See* 47 C.F.R. § 1.115 (d).

Sincerely,

Kenneth P. Moran
Chief, Accounting and Audits Division

ATTACHMENT

FCC REPORT 43 - 03 ARMIS JOINT COST REPORT AUDIT
SAMPLE OPINION LETTER

(We have audited, in accordance with generally accepted auditing standards, the consolidated balance sheet of

_____ (the "Company") at December 31, 199X and the related consolidated statements of income, shareholders equity, and cash flows for the year then ended, and have also issued our report dated _____ 199X in which we expressed an unqualified opinion on those financial statements.)* We have (also) audited the accompanying Company's Federal Communications Commission (the "FCC") Report 43-03, ARMIS Joint Cost Report (Columns (b) through (j)) for the year ended December 31, 199X. As described in Note 1, this report was prepared pursuant to the Company's Cost Allocation Manual, the FCC's Joint Cost Orders issued in conjunction with FCC Docket 86-111 and the FCC's published rules and regulations thereto (including 47 CFR Sections 32.23, 32.27 and 64.901) in force as of (date of audit report), 199X. This report was prepared for the purpose of complying with those rules and regulations and is not intended to be a complete presentation of the Company's financial statements. The FCC Report 43-03, ARMIS Joint Cost Report is the responsibility of the Company's management. Our responsibility is to express an opinion on the FCC Report 43-03, ARMIS Joint Cost Report based on our audit.

We conducted our audit of the FCC Report 43-03, ARMIS Joint Cost Report in accordance with generally accepted auditing standards. Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the FCC Report 43-03, ARMIS Joint Cost Report is free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the report. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall report presentation. We believe that our audit provides a reasonable basis for our opinion.

In our opinion, the FCC Report 43-03, ARMIS Joint Cost Report referred to above presents fairly, in all material respects, the information of the Company required to be set forth therein for the year ended December 31, 199X, in accordance with the Company's Cost Allocation Manual, the FCC's Joint Cost Orders issued in conjunction with FCC Docket No. 86-111 and the FCC's published rules and regulations thereto (including 47 CFR Sections 32.23, 32.27 and 64.901) in force as of (date of Audit report), 199X.

* If applicable. The preceding sentence would not apply if the accounting firms engaged for the general purpose financial statements are not the same as those engaged for the FCC Report 43-03.

NOTES TO _____ TELEPHONE COMPANY FCC REPORT 43 - 03, ARMIS JOINT COST REPORT

1. Basis of Presentation:

The Federal Communications Commission (FCC), in the Joint Cost Orders issued in Docket No. 86-111, required that Tier 1 local exchange carriers prepare a Cost Allocation Manual (CAM) for the FCC's review and approval. The CAM describes the cost allocation system used by the Company to apportion costs between its regulated and nonregulated activities in accordance with the FCC's rules and regulations. The Company's CAM, as amended through _____ has been filed with the FCC.

The Company's FCC Report 43-03, ARMIS Joint Cost Report was prepared pursuant to the Company's CAM, the FCC's Joint Cost Orders issued in conjunction with FCC Docket 86-111 and the FCC's published rules and regulations thereto (including 47 CFR Sections 32.23, 32.27 and 64.901) in force as of (Audit report date), 199X. This report was prepared for the purpose of complying with those rules and regulations and is not intended to be a complete presentation of the financial statements.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Suspension of License of

Joseph A. Della Barba
850 Coachway
Annapolis, MD 21401

Restricted Permit

ORDER TO SHOW CAUSE AND SUSPENSION ORDER

Adopted: October 29, 1990; Released: October 30, 1990

1. The Chief, Field Operations Bureau, hereby suspends the Restricted Permit issued to Joseph A. Della Barba on 31 January 1986. This action is based upon his violation of Commission rules prohibiting the unauthorized operation of a broadcast facility, and upon authority delegated to the Chief, Field Operations Bureau under Section 0.311 of the Rules. 47 C.F.R. § 0.311.

2. Section 303(m)(1)(A) of the Act authorizes the Commission to suspend an operator's license for violations of the Commission's rules or of the Act. 47 U.S.C. 303.

3. Section 301 of the Act prohibits any person from using or operating any apparatus for the transmission of communications or signals by radio without a license. FCC investigators determined that Della Barba was operating an illegal broadcast station on the 25.000 MHz and 15043 KHz frequencies, and the Commission has issued him a Notice of Apparent Liability in the amount of $1000 for violating the Rules.

4. In view of his actions, Della Barba also appears to lack the requisite character qualifications to be a Commission licensee. The Commission has reviewed the requirement that licensees deal truthfully with the Commission and comply with its rules and policies, and has determined that it is a relevant qualification for a Commission licensee. *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986), *recon. granted in part, denied in part*, 1 FCC Rcd 421 (1986), *Appeal dismissed sub nom. National Association for Better Broadcasting v. FCC*, No. 86-1179 (D.C. Cir. June 11, 1987) (hereinafter, *Character Policy Statement)*. The Commission has recently amended Part 1 of the Commission's rules, and the *Character Policy Statement* by its *Policy Statement And Order* adopted on May 10, 1990. FCC 90-195. This amendment makes the character requirement applicable to all Commission licensees. To the extent that Della Barba's action evidences a disregard for judicial and administrative authority, it also demonstrates a lack of the character required to be a Commission licensee.

5. Accordingly, Della Barba's restricted permit is hereby suspended for a period of two years. He may request a hearing, in writing, before an Administrative Law Judge within fifteen days (15) of receipt of this *Order to Show Cause*. If he requests a hearing the *Suspension Order* will be held in abeyance pending the evidentiary hearing and determination by the Administrative Law Judge. If a hearing is not requested, the Order will take effect after the fifteen-day notice period. 47 C.F.R. §1.85.

6. It is further *Ordered* that if the *Suspension Order* becomes effective, Della Barba must return the Restricted Permit issued to him on 31 January 1986 to the Radio Operator Branch, at RM 728, 1919 M Street, N.W., Washington, D.C. 20554.

7. This action is being taken pursuant to Section 303(m)(1)(A) of the Communications Act, 47 U.S.C. 303, and Sections 0.111(a), (b) and 1.85 of the Commission's rules, 47 C.F.R. §§0.111, 1.85.

8. This *Order* is being sent by Certified Mail--Return Receipt Requested and by Regular Mail. Any questions regarding this proceeding may be directed to the Chief, Radio Operator Branch at (202) 632-7240, or at the above listed address.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 87-313

In the Matter of

Policy and Rules Concerning Rates
for Dominant Carriers

SECOND REPORT AND ORDER

Adopted: September 19, 1990; Released: October 4, 1990

By the Commission: Commissioner Duggan concurring in part and dissenting in part and issuing a separate statement.

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I. INTRODUCTION AND BACKGROUND

A. Statement of purpose

1. This Report and Order adopts a new system of regulating the interstate common carrier services of the Nation's largest local exchange carriers (LECs). These companies, in providing the critical telecommunications link between a customer's premises and the interexchange networks, have until now been regulated under a "cost-plus" system of regulation, in which rates the LECs can charge for services are based on costs plus a return on invested capital. By our action today, the "cost-plus" system of regulation will be replaced for the largest of the LECs on January 1, 1991, with an incentive-based system of regulation similar to the system we now use to regulate AT&T. Incentive regulation will reward companies that become more productive and efficient, while ensuring that productivity and efficiency gains are shared with ratepayers.

2. In designing an incentive-based system of regulation for the largest LECs, our objective, as with our price caps system for AT&T, is to harness the profit-making incentives common to all businesses to produce a set of outcomes that advance the public interest goals of just, reasonable, and nondiscriminatory rates, as well as a communications system that offers innovative, high quality services. To accomplish this objective, the plan we adopt for LECs modifies the tariff review process to set a ceiling, or cap, on the prices LECs can charge for their interstate offerings. The price cap is subject to an annual adjustment that ensures prices will drop in real, inflation-adjusted terms. LECs that can outperform the productivity level embedded in the annual adjustment mechanism are rewarded with the ability to retain reasonably higher earnings than would be available under the former regulatory system. Depending upon their achieved returns, their ratepayers share in those earnings. Those LECs able to decrease prices beyond the required level can retain an even greater amount of earnings.

3. Price cap regulation of LECs, as we have designed it, is intended to produce rates within a zone of reasonableness. Higher earnings will be shared with, or returned to, ratepayers. The checks and balances built into the system ensure that, with periodic review and adjustment, price cap regulation can serve as a long term mode of regulation for the LECs subject to it. In this respect, we view price cap regulation no differently than many of the state governments and foreign administrations that have adopted incentive-based regulation for LECs' intrastate operations or their foreign equivalents, as a permanent method of regulation.

4. While the price cap system we adopt for LECs is similar in many respects to the one that we use to regulate AT&T, the differences in the markets involved, the difficulties in designing a single regulatory structure to apply to multiple companies, and a desire to safeguard regulatory programs promoting universal service, have required us at this initial stage to adopt an even more cautious and careful approach to the redesign of our regulatory processes than we did with AT&T.[1] As with the AT&T plan, the LEC price cap system essentially operates through the tariff review process to ensure rates are within the parameters our price cap rules require. However, the LEC system also contains additional safeguards, such as sharing of profits, that represent both a limited departure and logical outgrowth from the AT&T plan. Since the release of the *Notice* in this proceeding in August, 1987, the Commission has collected over 11,000 pages of pleadings in response to three subsequent Notices of Proposed Rule Making.[2] At each stage in the proceeding, the plan for LEC price caps has evolved in important ways. In this Report and Order, we again modify the plan to respond directly to concerns raised in the record.

B. Summary of the plan

5. The *Second Further Notice* proposed an interstate access price cap mechanism composed of three elements -- a measure of inflation, a productivity offset, and exogenous costs. We retain that basic adjustment mechanism, including the measure of inflation the Commission proposed [3] and a specific list of exogenous cost changes that are generally beyond the control of the companies involved and the product of regulatory decisions. Also as proposed, we decide not to employ the basic cap mechanism for non-traffic sensitive common line services. The mechanism we adopt for common line service embraces the philosophy that local exchange carriers should split the benefits in growth in minutes per line for common line service with their ratepayers. This philosophy balances demand-inducing incentives to improve and diversify network offerings, with the recognition that under rate of return, carriers have had somewhat limited incentives to influence growth in demand. We modify the prior proposal in response to concerns expressed by commenters that the specific equations used to determine carrier common line rates produced an unintended windfall to carriers. The equations have been revised to ensure that half the benefits of demand growth are reflected in the resulting reductions in carrier common line charges. In addition to removing the unintended windfall created by the prior common line formula, we conclude that the previously proposed 3 percent productivity offset, which included a Consumer Productivity Dividend (CPD) of .5 percent, is too low given the recent performance of the largest LECs in the provision of interstate access. Therefore, for the interstate access activities of the LECs subject to price cap regulation, we will mandate a price cap that requires a higher 3.3 percent productivity gain each year including the CPD, or if a LEC chooses, a 4.3 percent productivity gain including the CPD. Selection of a higher productivity offset, *i.e.*, lowering prices beyond the mandated level, will permit the LEC to retain a larger share of its earnings.

6. We respond in two ways to concerns about the validity of the productivity offset as to the industry as a whole and as to individual LECs. First, we will limit mandatory application of the price cap system to the eight largest LECs -- the seven Regional Bell Operating Companies (RBOCs)[4] and General Telephone and Telegraph Company (GTOC). The data we have collected as a basis for our selection of a 3.3 percent productivity offset is directly applicable to these largest carriers. For mid-sized and smaller LECs, price cap regulation will be optional. This decision addresses the concern that mid-sized carriers, those just below the largest eight in size, might not be able to generate productivity gains of the same magnitude as the largest LECs.

7. Our second response to concerns about the validity of applying a single productivity offset to a number of LECs is the adoption of sharing and adjustment devices. The mechanisms we adopt here ensure that ratepayers

share further in the benefits a price cap system can produce. If a LEC whose rates are at or below the price cap can outperform the 3.3 percent productivity offset embedded in the price cap, thereby earning a higher profit, the LEC will be entitled to retain all of its earnings up to 100 basis points (or 1 percent) above the 11.25 percent unitary rate of return established for rate of return carriers. When using a 3.3 percent productivity offset to establish prices, LECs must share with their customers 50 percent of their earnings between 100 and 500 basis points (1 to 5 percent) above the 11.25 percent level, and share (or credit their customers with) 100 percent of their earnings above 16.25 percent, or 500 basis points above 11.25 percent. Based on the 11.25 percent rate of return we select in the companion item we adopt today,[5] this mechanism allows LECs whose productivity performance exceeds the 3.3 percent productivity offset to potentially earn up to an effective equivalent of a maximum 14.25 percent rate of return.[6]

8. If a LEC decides to lower its set prices further by using a higher productivity offset of 4.3 percent, the LEC can retain more of its earnings if it subsequently is able to earn higher profits through improved efficiency. In this case, the LEC can retain all of its earnings up to 200 basis points (or 2 percent) above 11.25 percent. LECs would share with their customers 50 percent of their earnings between 200 and 600 basis points (2 to 6 percent) above 11.25 percent, and share 100 percent of their earnings above 17.25 percent, or 600 basis points above 11.25 percent. In electing to lower prices further to a level reflecting a higher 4.3 percent productivity offset, a LEC thus enables itself to reach an effective equivalent of a maximum 15.25 percent rate of return.[7]

9. This sharing mechanism for carriers whose rates are at or below the price cap provides strong financial incentives for carriers to improve productivity to the maximum extent possible, while providing ratepayers with additional upfront benefits of productivity gains in the form of price decreases. If a carrier manages to produce significantly higher returns, those are returned to ratepayers in the form of prospective downward adjustments in the price cap. This plan eliminates certain disincentives posed by the previous plan for an automatic stabilizer device that was proposed to control high earnings of LECs under price caps. Such a stabilizer would have created permanent downward adjustments to the cap each time earnings rose above a specified level. As such, it would have created some of the same disincentives as our present rate of return system -- cost padding -- in order to avoid triggering the stabilizer.

10. We retain a lower end adjustment mechanism with modifications, in order to ensure that the plan automatically corrects itself should our selection of a productivity factor for the industry turn out to be too high for a given company. Should a LEC's earnings drop below the lower end figure established, that LEC is entitled to a prospective automatic upward adjustment to its cap. The lower trigger point will be located 100 basis points (1 percent) below 11.25 percent.

11. The price cap forms the cornerstone of the new regulatory system, at once protecting ratepayers as a group from high prices and providing carriers with the incentive to increase productivity. However, since a cap on aggregate prices can result in some offerings being priced relatively high, while others are priced relatively low, we adopt further ratepayer protections in the form of baskets, service categories, and pricing bands. Baskets are broad groupings of LEC services, each subject to its own cap. Service categories are subdivisions of baskets. Pricing bands permit prices for service categories to move on a streamlined basis no more than plus or minus 5 percent per year, adjusted for the change in the price cap.

12. Together, the cap and pricing bands form a "no-suspension" zone, within which rates for LEC access services can be changed on a "streamlined" basis, *i.e.*, on 14 days' notice, with a presumption of lawfulness. If filed rates are at a level above or below the pricing bands, or above the cap, more burdensome tariff review requirements are used to evaluate the LECs' rates, and longer notice periods apply.

13. While the baskets continue to be defined by the interstate access structure contained in our Part 69 rules, we have decided to expand the number of baskets of services from three to four. The first three baskets will be common line services, traffic sensitive services, and special access services. The fourth basket is created for those LECs that offer interexchange services. As previously proposed, these offerings would have been included in the basket containing special access offerings. Inclusion of these very different services into one basket raised issues concerning the flow-through of exogenous costs that can be solved by separating the interexchange activity from interstate access. Furthermore, since these services compete with the offerings of interexchange carriers, we have decided to apply the productivity factor we use for AT&T: 3 percent. Since our short term productivity study did not include a separate evaluation of the productivity of these services, we believe it would be ill-advised to apply a higher productivity requirement to the LECs' interexchange offerings than we apply to AT&T.

14. Service categories are used in two of the four baskets to limit streamlined price movements.[8] In the traffic sensitive basket, we create three service categories: (1) local switching; (2) local transport; and (3) information. In the special access basket, we have decided to modify the service category proposal, reducing the number of categories from nine to four. Our decision is based on consideration of the small, and in some cases, shrinking amount of certain special access services offered by LECs. By grouping similar services together, we believe we have effectively prevented opportunities for the LECs to engage in pricing discrimination or anticompetitive practices. The four categories we adopt are: (1) voice grade/WATS/metallic/telegraph; (2) audio/video; (3) high capacity/Digital Data Service; and (4) wideband data/wideband analog.

15. In response to concerns about recent strategic pricing of high capacity offerings,[9] we will further limit a LEC's ability to move prices of its DS1 and DS3 services.[10] Prices for each of these offerings, which represent a large and rapidly growing portion of the LECs' special access business, will be allowed to move on a steamlined basis no more than plus or minus 5 percent per year, adjusted for changes in the cap. By creating individual subindexes for these services, while placing voice grade services in a separate category, rapid and dramatic movements in the prices for these services are held in check.

16. As proposed, a few LEC services will be excluded from price cap regulation. These are services offered on a one-time or contract basis that do not lend themselves to an ongoing incentive-based regulatory system. For example, services such as those provided to the Federal Gov-

ernment in response to Requests for Proposal, individual case basis offerings, and special construction are excluded from price cap regulation.

17. Also as proposed, LECs subject to price cap regulation will use July 1, 1990 rates as a basis for their first price cap filing. Those rates were subject to scrutiny as part of the annual access filing and review process, and have thus recently been retargeted to earn the authorized rate of return. In the companion item we adopt today, we lower the authorized return. Price cap LECs will be required to flow through the effects of that adjustment to their price cap levels and rates as part of their initial filing.

18. Companies that are required to enter price caps, or that volunteer for price caps, are required to do so on an "all or nothing" basis; all affiliates, except average schedule affiliates, must enter the price cap system. Our "all or nothing" rule is intended to prevent cost shifting to affiliates that are regulated under rate of return from affiliates that are subject to price caps. In addition, price cap "volunteers" and their affiliates that currently participate in National Exchange Carrier Association pooling arrangements must remove themselves from the pools before entering price caps. To accommodate this requirement, we have slightly modified the exit rules for depooling carriers. We also decide to permit voluntary elections into caps on an annual basis.

19. The tariff review standards we adopt are the same as those we now use for AT&T. Tariff transmittals containing only price changes that are within the cap and pricing bands are filed on short notice. Only those transmittals that contain within-cap and within-band price changes to existing services are presumed lawful for tariff review purposes. Any filings that include rate changes below the bands must be accompanied by an average variable cost showing and are filed on 45 days' notice. Any filings proposing above-band rates are filed on 90 days' notice and must be accompanied by a showing that substantial cause exists to justify an above-band rate. Any above-cap filings are also filed on 90 days' notice and must be accompanied by a detailed cost showing that will enable the Commission to determine compliance with statutory requirements of just and reasonable rates that are not unjustly discriminatory. These latter two types of filings carry with them a heavy burden of justification and a strong likelihood of suspension. New services, defined as those that expand a ratepayer's range of choices, are filed on 45 days' notice and must be accompanied by a showing demonstrating that the new service will generate net revenues for the LEC over a specified period of time. Restructured services, those that simply redefine existing offerings, are also subject to 45-day notice requirements, and are not presumed lawful. We have decided that Open Network Architecture services, and other services that require fundamental changes in the structure of our access charge rules, raise pricing issues that can best be resolved in other proceedings.

20. To enhance our ability to evaluate the price cap system and to ensure that the incentives created in the plan operate in the public interest, we are retaining our existing monitoring and expanding our collection of service quality information. By doing so, we can measure the success of our regulatory program and ensure continued high quality service to ratepayers. Furthermore, we find that periodic reviews of our regulatory system are essential to keep it on track. We therefore adopt, as part of the price cap package, the proposal to undertake a comprehensive performance review of the system after the end of the third year. The review, to be completed during the fourth year of the plan, will evaluate all aspects of LEC performance, and make any adjustments to the plan that are warranted.

C. Rationale for adoption of incentive regulation

21. In the *Second Further Notice*, the Commission articulated a policy judgment that incentive-based regulation is superior to rate of return for the regulation of certain dominant carriers, including local exchange carriers.[11] That policy judgment was based on a comparison of the existing rate of return system with an incentive-based system. In this Report and Order, we reaffirm the basic policy judgment that a properly-designed system of incentive regulation will be an improved form of regulation, generating greater consumer benefits, and we refine and further clarify the analysis yielding that conclusion.

22. As stated in the *Second Further Notice*, incentive regulation relies in the first instance on regulating prices. By establishing limits on prices carriers can charge for their services, and placing downward pressure on those limits or "caps," we create a regulatory environment that requires carriers to become more productive. Carriers that can substantially increase their productivity can earn and retain profits at reasonable levels above those we allow for rate of return carriers, although earnings above a certain level are shared or returned. If carriers fail to become more productive, they risk seeing their earnings erode. Rate of return regulation lacks incentives for carriers to become more productive. Under rate of return, carriers are allowed to set their rates based on the costs -- investment and expense -- of providing a service. Carriers are given fairly wide latitude in the costs they can claim as the basis for their rates.[12] As the Commission stated in the *Further Notice*, in this respect rate of return is akin to a "cost-plus" contract.[13]

23. Rate of return regulation in its present form has been with us for some time.[14] As reported in previous orders in this docket, initial efforts to limit carrier profits, and to discover rates that would yield no more than the profit limit, met with mixed success. While proceedings to establish just and reasonable earnings levels were completed, early attempts to adopt a rational basis for allocating costs between services were unsuccessful.[15] These initial attempts to apply a rate of return system to the pre-divestiture AT&T make clear that the process of championing consumer interests under a rate of return system is not a simple matter.

24. Of course, in the intervening years, the Commission has continually modified and upgraded its regulatory tools, and, in the process, solved many of the problems that confronted it in 1965. For example, our current system encompasses a set of rules for the routine retargeting of earnings limitations.[16] In addition, extensive attention is placed on carrier costs. Costs enter the accounting system pursuant to our Part 32 Uniform System of Accounts, and are separated into regulated and nonregulated components in processes dictated under our Part 64 rules.[17] Regulated costs are then separated into their interstate and intrastate components according to the Part 36 rules we jointly devise with state regulators. For LECs, interstate regulated costs are then allocated among the access elements we have prescribed in our Part 69

rules.[18] Thus, when LECs file their annual tariff updates refining their access rates, a major part of the cost allocation process is dictated by our regulatory requirements.[19]

25. Efforts to improve our rate of return regulatory system continue. Our rules are continually being revised in an effort to produce a set of regulations that maximizes our ability to administer the rate of return system in the public interest.[20] Our lengthy, substantial, and ongoing efforts to improve our rate of return methods, however, cannot create the positive incentives that are embodied in incentive-based regulation.

26. The basic rate of return mechanisms that form the foundation of our current system of regulation were originally designed for the regulation of public utilities decades ago. When rate of return was applied by the Commission to interstate telephone operations in the 1960s, the regulatory environment in which it was introduced was vastly different from today. In 1965, rate of return needed to be applied only to one telephone services provider -- AT&T.[21] One company essentially provided most local service, intrastate and interstate toll service, international service, virtually all research and development for the industry, as well as the manufacture of equipment through its Western Electric subsidiary.[22]

27. Today, we operate in a much more complex environment. The divestiture of the seven RBOCs from AT&T not only brought into being eight entities where formerly there was one, but also compelled the establishment of a uniform, tariffed system of charging interexchange carriers for access to the local networks for the origination and termination of messages. For the first time, the Commission had to apply its rate of return mechanisms directly to 1400 providers of access -- the independent LECs and the RBOCs. Moreover, as the *Second Further Notice* discussed, the once-sharp boundaries between communications and data processing became blurred.[23] Advances in transmission technology, geometric advances in microchip technology, and an improved ability to manage and utilize the spectrum, caused previously unrelated industries to come into competitive interaction.[24] As domestic markets evolved, so did markets at the international level. LECs today are involved in a broad range of international activities, a movement that will surely continue given the movement toward the liberalization of world markets.[25] At the same time, international entities are actively involved in U.S. markets, particularly in the provision of telecommunications equipment.[26] Finally, our own pro-competitive policies provide an environment for increased competition for a wide variety of telecommunications goods and services.[27]

28. In sum, the telecommunications environment LECs face has changed radically since the mid-1960s. And while we have made improvements in our ability to administer rate of return rules, the basic, underlying regulatory structure lying at the heart of our rules remains unchanged. We are also concerned that, particularly for the largest LECs, the system of regulation we currently employ does not serve to sharpen the competitiveness of this important segment of the industry at a time when markets for telecommunications goods and services are becoming increasingly competitive, both nationally and internationally. We are aware of the extensive debate currently in progress over the relative competitiveness of U.S. industries in comparison to those of Western Europe and the Far East.[28] We do not intend to ignore an opportunity to reshape our regulatory system in a manner that benefits us in the international marketplace while also improving the productivity of the LEC industry and benefiting ratepayers.

29. In making the judgment that incentive regulation is superior to rate of return, we do not find that rate of return is necessarily a bankrupt regulatory practice, but only that it is not the best. Previous orders in this docket have contained lengthy discussions of the tendency of rate of return regulation to produce inefficiencies, as documented by various scholars.[29] Commenters in this proceeding have extensively debated whether the inefficiencies attributed to rate of return in the form of rate base padding or the padding of expenses actually occur in practice.[30] Our own experience with administering a rate of return system convinces us that carriers in fact attribute unnecessary costs to their operations in an effort to generate more revenue. Our experience also reveals, however, that rate of return oversight is a responsible, functional method of correcting for these tendencies.[31]

30. Unfortunately, a regulatory system that simply corrects for a tendency to pad investments or expenses is not a system that can also drive LECs to become more efficient and productive. But incentive regulation, by limiting the amount carriers can charge for their services and continually exerting downward pressure on those price ceilings, can.[32] The downward pressure on price ceilings requires LECs to share the benefits of increased productivity with ratepayers in the form of lower rates. Both carriers and customers will be better off.

31. Opportunities presented by incentive regulation for enhancing efficiency in the LEC industry include the opportunity to provide better incentives for innovation. Innovation is not a term we define narrowly, as several parties do, to mean technological breakthroughs that lead to new services or offerings.[33] Our definition of innovation is far broader. Our definition incorporates innovation in management systems, administration, and in the multitude of what economists term "inputs" that are used to produce a firm's "output." In our view, innovation in how a company produces its output is one of the chief ways a company becomes more productive and efficient.

32. We do not subscribe to the view, attributed to this Commission by several parties on the basis of statements made in earlier orders in this proceeding, that our rate of return system necessarily discourages innovation.[34] Our view is that rate of return does not provide sufficient incentives for broad innovations in the way firms do business. Incentive regulation, by creating incentives for carriers to become more productive, generates powerful motives to innovate, and is a better way of regulating.[35]

33. Arguments that the provision of interstate access is not a competitive activity, and therefore as a policy matter we should not pursue incentive regulation of interstate access, ignore the benefits price cap regulation can provide to ratepayers.[36] The companies we seek to regulate under an incentive-based system are large, publicly-traded firms, that compete daily for sales of nonregulated products and services, in the financial markets, and in the labor markets. If we can design a regulatory system for these carriers' access business that mirrors the efficiency incentives found in competitive markets, we will have put in place a system that will go a long way toward making the LECs stronger, more productive competitors for all of the markets in which they must operate. The result will be an even healthier, more vital sector of the U.S. economy, and lower rates for consumers. Moreover, in their

interstate access activities, the LECs continue to operate with substantial monopoly power and therefore with little incentive to become more productive. Applying incentive regulation to LECs is arguably a more significant regulatory reform in terms of its ability to generate consumer benefits than applying incentive regulation to a carrier or industry that faces substantial competition.[37]

34. Another important reason for exploring incentive regulation for LECs concerns cost allocations and pricing. Previous orders in this docket have articulated the pressures that a rate of return system places on cost allocation systems.[38] In response to these pressures, the Commission has over time built up a complex system of cost allocation rules that track costs from their inception in the corporate books of account through their allocation to the various telecommunications services LECs provide. Indeed, given the incentives rate of return creates for companies to misallocate costs, thereby threatening our policy of ensuring that rates are based on their fully distributed costs, we spend a great deal of our regulatory resources policing our cost allocation systems.[39] Under incentive regulation, prices would no longer be set by reference to a set of fully distributed costs, but would be set by reference to a formula that tracks aggregate industry costs. Incentive regulation, by in large measure removing the incentive to misallocate costs between services, may mitigate misallocation as a regulatory concern.[40]

35. While this is an important issue for us in terms of managing regulatory resources, which are scarce in comparison to the industry we regulate,[41] we find there are also economic benefits to be obtained from moving away from a system in which regulators dictate prices on the basis of fully distributed costing principles, toward a system of limited pricing flexibility. It is more desirable to permit LECs to migrate their rates toward a set of prices that enhances efficiency. As we discuss *infra*, permitting flexibility in price-setting generates economic efficiencies that benefit ratepayers through lower rates. Since it is no longer required that every service cover its fully distributed cost of overheads, LECs also have the incentive to provide more services, to the benefit of ratepayers. Furthermore, with additional services, LECs can take advantage of economies of scope, also to the benefit of ratepayers.

36. Some parties have sought to equate pricing flexibility with the ability to engage in predation against the newly formed alternative access industry, or to engage in cross-subsidization to the detriment of particular classes of customers.[42] We believe that the limited amount of pricing flexibility available to LECs under our incentive regulation plan will not grant a license to LECs to engage in predation or cross-subsidization. Indeed, our decision not to streamline price cuts below a certain level, and to require more detailed cost information for those price cuts, is testimony to our commitment to police any LEC attempts to engage in predation or cross-subsidization. Moreover, segregating LEC access services into four baskets defeats any LEC attempts to finance a predatory rate level by contemporaneously increasing rates for other services. And, since aggregate prices in these baskets cannot rise above the price cap ceiling, it should be difficult for LECs to engage in the classic predation scenario of lowering prices to predatory levels today in an effort to raise them to monopoly levels once competition is defeated.[43] Our Section 208 complaint process remains available as a further check against possible predation. Thus, we remain committed to ensuring that rates are just, reasonable and nondiscriminatory.

37. Another, albeit less significant, reason for finding incentive regulation superior to rate of return lies in the effect the two systems have on the administration of the tariff review process. Incentive regulation provides a simple mechanism for creating a demarcation line between those tariffs that represent minor deviations from existing tariffs, and those representing more major changes. Moreover, incentive regulation provides a streamlined approach to cost support for those filings that do not substantially deviate from existing tariffs. Instead of requiring Section 61.38 cost data,[44] incentive regulation would simply require LECs to file indexes that show whether prices are within the cap limitations and are within the limits on annual movement in prices we establish. The process enables carriers to effect limited rate changes without regulatory intervention. And, as we have noted in previous orders in this docket, in the long run it substantially mitigates the administrative burdens carriers face in preparing and filing tariffs. At the same time, this approach allows regulators to focus additional scrutiny, and resources, in other areas.

D. Regulatory alternatives

38. In the course of debating the relative merits of price cap and rate of return regulation, a number of parties have asked the Commission to consider alternatives to price cap regulation.[45] Several parties ask that we instead focus on ways of improving rate of return regulation.[46] Some commenters unite behind the proposition that regulatory lag is a better alternative than incentive regulation.[47]

39. Although improvement in rate of return methods is one possible course to follow in reforming current regulatory practices, it is not the best approach. We recognize that a number of state regulatory commissions have opted to improve rate of return regulation in redesigning their regulatory structures. Nevertheless, only a few states now continue to regulate intrastate LEC activities pursuant to traditional rate of return practices.[48] The majority of states have authorized significant reforms to their regulatory systems, as part of an effort to improve efficiency incentives, increase flexibility, reduce administrative burdens, and benefit consumers.[49]

40. We believe that, where an incentive-based system can be designed to benefit both carriers and their customers, incentive-based regulation will produce greater benefits than adjustments to rate of return. We therefore disagree with those who advocate rate of return with a period of "regulatory lag" as a means of inducing carriers to become more productive. These parties argue that by delaying or "lagging" the represcription of earnings, carriers will have incentives similar to those offered by price cap regulation to become more efficient.[50] Regulatory lag produces none of the rate decreases that the proposed incentive system provides through the operation of our overall incentive-based plan, including the Consumer Productivity Dividend. Furthermore, the reality of the legal framework within which we must operate is that we could not hold carriers to a given set of prices during the period of the "lag," and we could not guarantee that carriers would be able to retain any profits above the

prescribed maximum. As the LECs argue, regulatory lag is unworkable given the existing requirements of the Communications Act.[51]

41. A growing number of state regulatory agencies appear to agree with our conclusion that shifting the regulatory focus toward prices that ratepayers pay, and de-emphasizing traditional rate of return principles, creates incentives for productive behavior. While not all incentive-based plans operating in states today have an indexed cap such as the one we propose for interstate access, the plans share a common goal of providing earnings incentives for carriers to become more productive, while benefiting ratepayers through stable or lower rates.[52] These plans are often scheduled as limited- time trials.[53]

42. California, New York and Michigan have incentive-based plans similar to the one we adopt for interstate activities. California's plan is most like ours, with a formula for annual adjustments based on GNP-PI, a productivity offset, and exogenous costs. California also uses a sharing mechanism. California's plan differs from ours in its inclusion of a network investment component, and its intention to perform a complete review after two years. New York has separate regulatory plans for New York Telephone (NYT) and Rochester Telephone. The NYT plan includes a price floor based on incremental cost, and sharing with customers of NYT earnings over an allowed level. The Rochester plan includes an annual adjustment formula based on inflation with a productivity offset of 3.25 percent and exogenous costs; it also includes a sharing mechanism that operates above a certain earnings level. The Michigan plan also includes an interim (2-year) review as well as a final review.

43. Incentive regulation may take other forms as well. The Vermont commission and New England Telephone (NET) have agreed upon a Negotiated Social Contract, effective 1988-92. Under this contract, NET's local service rates are frozen; its toll, WATS, and Centrex rates are capped. NET's new services and digital data services are deregulated. In addition, many states are seriously considering, and are considered likely to implement, specific incentive regulation proposals, while others have undertaken a general study of various regulatory reforms.[54]

44. Despite the strong and growing presence of incentive-based regulation as a means of regulating LECs, a number of parties argue that a price cap plan along the lines advanced in the *Second Further Notice* and in the *Supplemental Notice* should not be adopted.[55] We disagree. In reviewing the arguments concerning specific aspects of the proposed plan, we have made several substantial modifications. With these changes, we believe that the LEC price cap system will operate in the public interest. We therefore decline the invitation of some parties to extend even further the extensive record before us and to renew our study of the issues.[56] In this Order we adopt a set of final rules to begin price cap regulation of LEC interstate access services effective January 1, 1991.

E. Summary of the Order

45. The Order is divided into the following substantive sections. The first section discusses the operative portions of a price cap regulatory system. We begin with a discussion of the capping mechanism, including the sharing and adjustment device. Next, we discuss the services that price cap regulation will apply to. In the baskets and bands discussion, we review necessary limits to LEC pricing flexibility. We then discuss our use of actual rates as a basis for launching price cap regulation. The next sections discuss eligibility requirements, tariff review standards, and issues relating to small companies that will continue to be regulated under rate of return.

46. The Order next reviews the monitoring requirements we will impose. We discuss expanded service quality requirements, our current monitoring efforts, as well as the performance review that we will undertake after the third year of price cap regulation. We also briefly discuss how the price cap system affects other existing regulatory programs. We conclude with a discussion of our legal authority to adopt price cap regulation for LECs.

II. THE PRICE CAP PLAN

A. The Price Cap Index

47. The Price Cap Index (PCI) is designed to limit the prices carriers charge for service. By employing a regulatory system that shifts our focus to prices while permitting retention of some reasonably higher earnings, we provide carriers an incentive to become more productive, and to offer new services. To provide a quantitatively achievable incentive for the LECs, the price cap mechanism includes components that reflect historical LEC productivity, and then requires them to out-perform historical trends. These factors are the productivity offset and the Consumer Productivity Dividend. The establishment of an objective productivity hurdle that applies to prices in each year of the plan provides the LECs an incentive to be more productive, since an improved productivity performance above the amount required by the formula permits them to generate and retain higher earnings.

48. The PCI contains three components. The first two, a measure of inflation less a productivity offset, represent the amount by which carrier productivity has historically exceeded productivity in the economy generally. The value attached to the PCI is further permitted to move up or down in response to specific exogenous cost changes. Exogenous cost changes are generally outside the carrier's managerial control and are often the product of this Commission's own regulatory actions.

49. In broad terms, the PCI is the first test of whether a carrier's tariff filings qualify for streamlined review. By setting price limits that are defined by changes in input costs, the formula controls aggregate rates charged by carriers from fluctuating beyond a "zone of reasonableness". The component parts of the formula – the measure of inflation, the productivity offset (including the Consumer Productivity Dividend), and the specific exogenous factors – are discussed below.[57]

1. GNP-PI

50. As the Commission found in adopting price cap regulation for AT&T, we believe that the Gross National Product Price Index (GNP-PI), regularly calculated by the U.S. Department of Commerce, is the best inflation adjuster available for use in the price cap index. In proposing the GNP-PI, the Commission sought an index that would reflect changes in costs that carriers face and that would not exhibit volatility attributed to inflationary pressures in one or two sectors of the economy. The Commission also sought an index that the LECs could not influence or manipulate. While we acknowledge that no

existing index perfectly serves these purposes, we find that a broad-based index best matches the criteria we seek in an indicator that measures changes in the cost of factors of production. After considering various other indicators, including the Consumer Price Index (CPI), the Producer Price Index (PPI), and the Gross National Product deflator (GNP deflator), we are persuaded that the GNP-PI is the best option available. While we adopted the 75-day GNP-PI estimate for AT&T, we find that different considerations are determinative here, and that the 45-day estimate is more appropriate for LEC use. As the LECs noted in earlier pleadings,[58] the use of the 75-day estimate would leave them inadequate time to incorporate the GNP-PI for their annual tariff filing in April. Accordingly, we are adopting the 45-day GNP-PI estimate for use by price cap LECs.

51. In adopting price caps for AT&T, the Commission determined that the CPI and PPI reflect fewer sectors of economic activity than does the GNP-PI, and thus are more volatile and are less likely to reflect the costs faced by carriers.[59] The Commission suggested that the broad-based GNP-PI is superior to indexes that reflect only consumer prices or the prices faced by manufacturers. Further, the Commission rejected the use of a current-weight index like the GNP deflator, since such an index cannot be used to compare the present cost of an item with its cost in a previous period.

52. The GNP-PI, like the CPI, is a fixed weight index, and allows period-to-period comparison based on an historical base period.[60] While the CPI summarizes price changes that occur in goods and services that consumers purchase, the GNP-PI summarizes price changes that occur in all sectors of the economy, not just consumer items. The expenditure categories and the weights within CPI, based on consumer items, cover only about 65 percent of the changes considered by the GNP-PI. This is because the CPI includes nothing but final sales to consumers, while most of the LECs' purchases are of intermediate and capital goods. While the GNP-PI does not mirror the LECs' expenditures exactly, it does encompass investment goods as well as consumption expenditures.[61] Over the last thirty years, the CPI and GNP-PI have been highly correlated, with the CPI's movements generally matched by GNP-PI movements about 80 percent as large. The CPI is far more volatile, due in part to its emphasis on categories that have larger weights in consumers' budgets than their importance in the economy as a whole, such as large increases for energy and medical care. LEC commenters support the use of the GNP-PI.[62]

53. With regard to the GNP deflator, the Commission stated that it was not convinced that the correlation between the GNP deflator and the AT&T pre- divestiture index, the major assertion made by commenters supporting use of the GNP deflator, overcomes the difficulties of adopting a current year weight mechanism for use as a price index.[63] The use of a current year weight means that the index cannot be used to measure price changes on a period-to-period basis, since changes in the quarterly composition of GNP can affect the GNP deflator even if there were no changes in prices.![64] As the Commission stated in adopting price caps for AT&T, the Commerce Department itself advises against using the GNP deflator as a price index.![65]

54. In the *AT&TPrice Cap Order* the Commission also discussed, and rejected after careful consideration, the suggestion of some commenters that it develop an industry-specific cost index. The Commission stated that such an index would be too vulnerable to manipulation by individual LECs or groups of LECs. Further, it stated, the development of such an index would be difficult and time-consuming, and once developed, the index would require some lengthy period of trial and adjustment.[66] In this proceeding Indiana has renewed the argument in favor of an industry-specific index, but has provided neither information regarding how this could be effected, nor any persuasive argument that the potential for manipulation is smaller, or the difficulty less, than the *Second Further Notice* indicated. [67] We accordingly conclude that formation of an industry-specific cost index for use in a LEC price cap system should be rejected.

2. Measuring LEC productivity

a. Common Line formula adjustment

55. The basic concept of a price cap plan, as the name indicates, is to focus regulation not primarily on a component of price such as earnings, but more on the actual prices the customer sees on the bill. Thus, the AT&T price cap formulas and those we are adopting for most LEC access rates are based on a relatively straightforward limitation on the rates as charged. For these services, increased productivity is directly reflected in reduced unit cost and thus in the reasonable rate for each unit the customer buys.[68]

56. Common line (CL) rates, however, present a unique problem, because of the important social goals and programs that have been embedded in those rates. Common lines are local subscriber loops linking the customer's phone to the local exchange office. The actual costs of these loops are non-traffic sensitive. That is, the cost of a loop is the same regardless of how much or how little the loop is used, or whether the calls are local, intrastate toll, or interstate toll. However, CL costs are recovered in part through rates that do reflect traffic.

57. As part of past programs to balance goals of more economically efficient and rational prices with universal service, the Commission, in cooperation with state commissions, has developed a calibrated program to recover CL costs. First, a flat 25 percent of those costs is allocated to the interstate jurisdiction, regardless of usage. Second, a portion of those costs is recovered by flat, per line monthly rates charged to local end users. These end user or subscriber line charges are capped at $3.50 for residential and single-line business customers and $6.00 for multiline businesses. Third, a special access surcharge of $25 per line is charged to interstate special access lines that are switched to interconnect with local common lines. Fourth, the remaining CL costs are recovered by per minute carrier common line (CCL) charges, which are assessed, per minute of use, on interexchange carriers and customers using interexchange, interstate services such as foreign exchange. And fifth, to promote universal service and nationwide-averaged rates for the small town and rural subscribers served by the hundreds of LECs in the National Exchange Carrier Association (NECA) pool, the NECA CCL rate is maintained at the industry average CCL rate by means of support payments contributed by other, non-pooled LECs.[69]

58. This Commission's consideration of regulatory reform under price caps in no way indicates any retreat from its goals of economic efficiency balanced with universal service and affordable rates. In particular, we have

not adopted any change in the rules setting a maximum limit on subscriber line charges. We also retain the $25 special access surcharge, which recovers a share of local exchange costs from large users. At the same time, we do wish to provide incentives for greater productivity in the provision of common lines as well as for other access elements. To accomplish this has required a special formula to mesh the residual CCL rates into the price cap plan.

59. We have considered three separate formulas in earlier Notices. One formula would cap a total CL rate per minute, computed as if none of the total amount were recovered by end user charges. The CCL rate would then be computed as the difference between the CL price per minute and the end user price per minute. This formula would have the effect of treating any increase in demand per line as an improvement in productivity. It was supported by the LECs. [70] We also requested comments on use of a per line formula, under which all growth in minutes per line in one year would be applied to reduce the maximum CCL rate in the next year. LECs would benefit from any productivity gains derived from reducing average costs per line, but not from any increase in usage per line. The per line formula was favored by other commenters, such as AT&T.[71]

60. Third, we considered and proposed in the *Second Further Notice* a formula that combined both of these methods. This formula was a simple average of the per minute and per line formulas advocated by the various contending commenters. We refered to it as the "50-50" formula. Essentially, it represented a compromise that recognized that demand growth over common lines is, in substantial part, outside the LECs' influence and control, because usage largely depends upon the services and rates offered by the interexchange carriers. But we also judged that the LECs do have the ability to encourage CCL growth as well as to reduce costs. A subsequent Public Notice by the Chief, Common Carrier Bureau explained the mathematics of this proposal, giving examples of how the 50-50 formula would be used to calculate the allowable CCL rate under price caps.[72]

61. In the comments received since the *Second Further Notice*, the LECs continue to prefer a per minute CL formula. BellSouth contends, for example, that growth in usage per line is a source of scale economies embodied in the historical productivity studies, and is necessary for the LECs to meet the Commission's aggressive productivity factor.[73] The effect of a per line formula, and its failure to treat demand growth as productivity growth, is said to create an especially difficult hurdle for small and mid-size LECs.[74] A per line approach is also said to penalize LECs who plan to bring service into previously unserved areas with higher costs.[75]

62. The LECs do generally agree that a 50-50 plan is a better alternative than a per line plan. SWB states, for example, that the proposal strikes a reasonable balance between competing interests.[76] NYNEX describes it as a workable alternative.[77] There are, however, three major objections to the 50-50 formula in the record. AT&T and other commenters contend first that the LECs have little ability to influence growth in usage per line, and that the per line formula accurately recognizes this, while 50-50 does not.[78]

63. Second, AT&T and other commenters also contend that the mechanics of the 50-50 formula produce what they claim is an anomalous result. Under current rate of return regulation, an increase in CCL usage produces lower rates, in part because CL costs do not vary in relation to usage. Under the 50-50 formula as clarified in the Public Notice, an increase in CCL usage could result in an increase in the allowable CCL rate. This result is said to create a windfall for the LECs, who are allowed to increase prices without any corresponding increase in costs.[79]

64. Third, commenters also contend that the choice of a formula is related to the level of the productivity offset factor, and that the proposed 3 percent factor combined with the 50-50 formula would allow unreasonably high rates. Ad Hoc contends, for example, that the effect of the formula is to reduce the productivity offset for the CCL basket to zero.[80] AT&T and MCI argue that the historical productivity studies do not necessarily measure output only in minutes, and there is no logical basis to claim that those numbers fully reflect productivity associated with demand growth on per minute CL costs.[81] The productivity studies on which the proposed factor was based are said to use lines -- not minutes of use -- as the output variable.[82]

65. The fundamental principle of price cap regulation is that increased efficiency is most surely generated by profit incentives; where the LECs have the ability to spur higher productivity, they should be given a fair incentive to do so. An increase in average usage per common line could represent an increase in productivity, and we continue to believe that the LECs have opportunities to affect this particular form of productivity gain, despite some commenters' claim to the contrary. The LECs directly provide some services that generate interstate CCL minutes of use, such as foreign exchange and interexchange long distance. The rates, service features, and marketing of those services can be expected to influence CCL demand. Moreover, installation of new technologies such as SS7 signalling can increase the vitality of competition in areas such as 800 service, helping generate lower rates and increased demand. Improvements in network facilities and operations that improve set up times, call completion ratios, and transmission quality should also encourage usage over common lines instead of private lines and bypass facilities. Expanding features available with toll services, such as call waiting and call forwarding, and developing entirely new common line-based services such as ISDN, would increase the value of common lines to customers, and thus the usage per line. LEC advertising to encourage calling and to highlight the benefits of telephone service generally is likely to spur interstate as well as local and intrastate toll traffic. The LECs frequently provide the billing and collection services associated with services using the CCL rate elements, and their improvements in the utility of the information contained in the bills, the reduction of uncollectibles, and the lowering of the price can all be expected to stimulate CCL-based services in preference to private line or bypass.

66. Of course, interexchange carriers also influence growth in usage. Most interexchange services are provided to retail customers by the interexchange carriers, who establish the specific service offerings such as ordinary long distance, WATS, 800, and more specialized services. Improvements in the price, quality, and features of these services will directly encourage increased usage of access service and facilities, including common lines. Increases

in usage as a result of interexchange carriers' efforts and decisions are also an important source of productivity gains.

67. Under rate of return regulation, increases in CCL minutes per line were almost entirely flowed through to rates, so it is difficult to predict the extent to which LECs will be able to spur additional increases under price caps. It is correspondingly difficult to weigh this potential productivity gain against gains that result from independent actions taken by the interexchange carriers. If any productivity incentive is to be created for LECs to increase CCL minutes per line, some initial judgment is necessary on how the benefits are to be shared.

68. Within the overall formula of the price cap plan, we continue to believe that an approximately equal, 50-50 division strikes the best balance, at least in the initial four year period of price cap regulation. In the past, increased minutes per line were largely spurred by the subscriber line charge program, which lowered CCL rates substantially and stimulated long distance calling. Those productivity gains are already built into the existing rates that provide the starting point for price caps.

69. In the future, productivity gains will depend more directly upon the operational performance of both the LECs and the interexchange carriers. There is no determinative evidence in the record to establish whether future productivity from demand increases will originate more from LEC or interexchange carrier efforts. However, we conclude that future growth can be maximized only if both are encouraged to search out ways to become more productive, and both are rewarded for their success. A per line formula would give 100 percent of the benefits to the interexchange carriers and other interexchange customers, and a per minute formula 100 percent to the LECs. While a 50-50 sharing of the benefits may not be a precise reflection of LECs' ability to influence usage, it has the very substantial merit of recognizing the roles of both LECs and interexchange carriers in a way that neither of the 100 percent-type formulas can. We are very reluctant, especially at the beginning of the program, to include in the plan a feature that would actively discourage potential sources of increased productivity. In principle, we remain of the view that a CCL formula that provides approximately half the benefit of demand growth to LECs and half to interexchange carriers is the most reasonable approach to ensuring that both will have the opportunity for CCL demand productivity improvements, and the incentives to exploit them, in light of the special programs for common line rates.

70. We recognize that, in isolation, consumers may seem better off under a per line formula if demand per common line increases. In the long run and in the overall operation of the price cap program, however, consumers should be better off under the Balanced 50-50 formula. For example, we described the per line formula as giving all the benefits of demand growth to customers, but it also gives them all the risks of a decline in growth per line. There is no guarantee that demand per line will increase, especially in an economic downturn. The Balanced 50-50 formula shares both gains and losses in usage per line between LECs and customers, so that customers enjoy lower rates when demand growth slumps than they would under a per line formula. In addition, as the added incentive of the Balanced 50-50 formula encourages LECs to upgrade their networks in ways that stimulate growth in demand, consumers should benefit from improved services. They will also benefit from a half share of productivity gains that might never have occurred at all if LECs had not been given the incentive to generate them. Within the structure of the price cap plan, including the increased productivity offset and the sharing requirements, the Balanced 50-50 formula should help to create benefits for both consumers and LECs. We will, in addition, monitor demand growth and, if necessary, adjust the formula during our foruth year performance review.[83]

b. Mathematics of the Common Line formula

71. We do find merit in contentions that the specific 50-50 formula calculations we had proposed do not in fact always result in a sharing of the benefits of demand growth in accordance with the policy determination outlined above. In some circumstances, it appears that the formulas as proposed could have the anomalous result not of sharing these benefits, but of actually allowing CCL rates to increase as minutes increase. This was not our intent, and it is thus necessary to correct the formula to ensure both that a reasonable growth incentive is created and that rates will continue to decline as demand increases. Recognizing the problem, some parties proposed new CCL formulas.[84] The Commission's proposed 50-50 formula had two parts: first it computed a price cap index on the overall CL basket, then it set a specific maximum CCL rate. AT&T's formula would retain the PCI part of this formula, but replace the CCL calculation with the same API method used in other baskets, computing weights for the SLC and CCL components of the CL basket. We have found, on examination, that this approach creates another per line formula, with virtually all benefits of demand growth flowing through to interexchange carriers.

72. Similarly, USTA responded by proposing its own so-called Index formula. In practical effect, the USTA formula gives virtually all benefits of demand growth to the LECs. As demand increases, CCL rates would be virtually unchanged. The USTA formula is thus also unacceptable.

73. Upon closer examination of our proposal and of the comments filed in this proceeding, we find that none of the new formulas, nor the specific calculations within the previously proposed 50/50 formula, reasonably accomplish the balanced goals we seek: strong growth incentives and lower rates. To address this problem we have therefore developed a modification of the original 50-50 formula that does accomplish both goals. The modification, which we are calling the "Balanced 50-50" formula, is described in detail in Appendix E. Basically, the revised formula replaces the factor for growth in minutes per line ("g" in the original formula) with use of half of the growth, or g/2, in both parts of the calculation, the overall basket PCI and the CCL calculation. Conceptually, in place of the average of the per line and per minute approaches in the old 50-50 formula, this more balanced 50-50 formula reduces the PCI by a percentage representing half the growth in demand per line in the prior year. The formula, as revised, will accomplish the intended balance of goals. As demand increases, the CCL rate will be pressed down, though not by as much as in a per line formula. The difference should provide a substantial incentive for LECs to undertake programs and activities to stimulate CCL usage.

c. Productivity offset

74. In prior Notices in this proceeding, the Commission explained that the mechanism used to cap LEC rates must include both a measure of inflation and a measure of the amount by which LEC productivity exceeded that of the economy as whole.[85] The inflation measure embodies economy-wide productivity gains and price changes, while the "productivity offset" subtracts the amount by which LECs can be expected to outperform economy-wide productivity gains. As we did in the selection of AT&T's productivity offset, we consider both short term and long term measures of historical productivity to provide guidance in selecting an equitable productivity factor. We also take into account that historical studies can provide only limited guidance in setting a productivity offset that will be reasonable in an unknown future, not a known past. Based upon our review of the methods and results of historical productivity analyses, and of their application to the future, as well as of the comments filed in this proceeding, we conclude that the offset previously proposed in this proceeding is insufficient. We are therefore increasing the proposed 3.0 percent productivity offset for LEC interstate access services (including a 0.5 percent CPD to ensure direct benefits to ratepayers) to either 3.3 or 4.3 percent, depending upon the level of sharing a LEC chooses. This increase in the productivity offset is in addition to the increased productivity challenge generated by our adoption of the Balanced 50-50 common line cap. The result is an increase in the overall challenge of the price cap plan to the LECs, and substantially increased benefits to customers.

1) Purpose of the productivity offset

75. Setting a reasonable target and requirement for LEC productivity is one of the critical tasks in ensuring that the price cap plan will work as intended. As we have discussed in the various Notices in this proceeding, there s a substantial body of evidence indicating that the telecommunications industry has historically been more productive than the American economy as a whole.[86] As a result, the productivity growth embedded in the GNP-PI data has not fully reflected changes in the costs of factors of production for LECs or the changes in their prices; the higher than average growth in LEC productivity has resulted in lower than average telephone prices, relative to inflation. To reflect this fact in the price cap plan, a productivity factor offset must therefore be included in the price cap formula, to ensure that rates continue to decline relative to our measure of inflation, GNP-PI.

76. Our approach to establishing a reasonable offset has been in two stages. First, we have examined evidence and studies on historical telecommunications productivity, to establish an accurate productivity baseline, a level that LECs would be expected to achieve without regulatory reform. Second, we have proposed to add an additional productivity obligation, the Consumer Productivity Dividend or CPD, to assign the first price cap productivity gains to customers in the form of lower rates. This combined productivity offset factor, in combination with the additional rate reduction incentives and requirements in the backstop mechanism, is intended to balance fairly the interests of customers and LEC shareholders, while fostering their joint interest in a more efficient telephone industry.

77. In the earlier Notices, the Commission analyzed the economic literature on telephone company productivity, including available published studies as well as additional studies performed by the parties for this proceeding. Many of these studies were useful, but none fully and conclusively addressed or answered the specific question of the proper baseline productivity for LECs subject to price caps. In general, though, the studies fairly consistently supported a historical productivity offset ranging between 2 and 3 percent over the last 40 years, with slightly lower values in the earlier years. Based upon this record, the Commission adopted a productivity offset of 3 percent for AT&T (a baseline of 2.5 percent and a 0.5 percent CPD). The Commission proposed to apply the same productivity offset to the LECs, but also recognized the substantial additional issues and problems in establishing a reasonable figure for the LECs, who vary subtantially in size and geography. Previous Notices requested additional studies from the parties,[87] and also requested comment on two new studies performed by Commission staff members: a short term study of productivity for interstate switched access since the Bell System divestiture and a long term study of the total telephone industry between 1928 and 1989.[88]

78. We have once again thoroughly examined the evidence and studies of record. This analysis involves extremely complex and technical issues of data accuracy, assumptions, necessary adjustments, and statistical methodology.[89] We have found that long term measures tend to result in a lower productivity offset, while short term measures result in a higher productivity offset. As the *Supplemental Notice* suggested, therefore, the selection of an offset requires us to exercise our judgment to resolve this disparity in the historical record. Even if the historical record were clear, the future is not. The historical studies cannot assure that the future, in which the price cap plan will be applied, will not differ from the past.

79. We need not repeat at length our discussion in the previous Notices and in the Appendices to this Order the many technical issues raised by these studies. In this section of the Order, we discuss the technical issues germane to the various studies only to the extent necessary to explain the rationale for our decision to adopt a substantially higher productivity factor than the Commission had originally proposed.

80. *AT&T's " simple " plan.* In its Supplemental Comments, AT&T proposes that we replace the previously proposed price cap formula of GNP-PI less a productivity offset of 3.0 percent by a "simple" plan that would freeze prices for the next four years, regardless of inflation, but with adjustments to reflect exogenous cost changes.[90] AT&T projects that inflation will average 4.1 percent per year during this period. AT&T also proposes to cap individual rates, and argues that no stabilizer or sharing would be necessary under this plan.

81. AT&T's estimate of inflation is, of course, only a prediction. If AT&T is correct, the rates under its plan would imply a 4.1 percent productivity offset. If inflation differs, actual results would also differ. But we do not believe it reasonable or prudent to try to predict inflation so far into the future. AT&T's plan would require annual adjustments in the PCI to reflect exogenous changes in any event. A simple additional adjustment to reflect actual GNP-PI should be a more accurate, less speculative means of reflecting inflation.

82. Moreover, AT&T's "simple" plan assumes that all LECs will price at the full rate permitted by the PCI formula, and argues that the end result would be reasonable even without a backstop plan. The backstop plan we

are adopting encourages LECs to set a higher productivity target for themselves, and thus lower rates further. It also requires rate reductions at specified earnings levels. Overall, these additional mechanisms should significantly increase the benefits of the plan to customers and produce rates lower than those likely to occur under this AT&T proposal.

83. *Short term historical productivity studies.* Alternatively, AT&T and its analysts, supported by other large customers and their analysts, argue that the productivity offset should be set based solely upon short term, post-divestiture productivity, but ignoring the first year after divestiture, 1984.[91] The data from this year are claimed to be out of trend statistically, as well as inaccurate, due to post-divestiture turmoil. These commenters also argue that the access rates that took effect after adjustment by the Common Carrier Bureau on July 1, 1990 are consistent with and thus confirm the validity of the 1985-89 productivity trends as a predictor of the future under rate of return regulation.[92] LEC commenters argue that there is no valid basis for discarding the 1984 data, and contend that the Bureau's adjustments to the July 1, 1990 rates amounted to a premature upfront price cap rate cut.[93]

84. We have examined the claims raised concerning both the 1984 and 1990 data points. Based upon this examination, we believe that both provide important information regarding post-divestiture productivity. While there were some errors in the 1984 data supplied by the industry and used in the staff's short term study, we have identified and corrected those errors in the revised study, as detailed in Appendix C. We have also included data using the rates scheduled to be in effect under rate of return regulation from July 1, 1990 through June 30, 1991, rates that were the result of the LECs' own access rate reductions and the analysis of Commission staff, based on the record in that access proceeding. Taken together, the 1984 through 1990 data, adjusted for numerous exogenous factors and events, represents the best single view of post-divestiture productivity growth, adjusted for inflation, for the services we are considering – interstate switched access. The study contained in Appendix C indicates that the productivity offset necessary to replicate switched access prices would have been approximately 3.5 percent from June 1984 through June 1991, using a Balanced 50-50 price cap formula.[94]

85. *Short term prospective studies.* The staff's short term study is historical. It calculates a productivity offset to match 1984 through 1990 costs, demand, and revenues but does not attempt to evaluate how representative that period was or will be for the future, except by attempting to remove exogenous factors. The main analysis supporting claims that rates could be higher under price caps than under projections of the continued application of current rate of return regulation was submitted by AT&T. AT&T extracts data from the staff's short term, post-divestiture study to perform two prospective analyses of rates.

86. AT&T claims its first study computes the differences between the revenues the LECs would be allowed, under the original 50-50 formula, if a price cap plan using a 3.0 percent productivity factor is adopted, rather than the 3.8 percent or 5.63 percent factors calculated in the original short term study,[95] or the 5.63 percent or 6.9 percent factors computed by AT&T consultants.[96] The difference between the 3.8 percent factor in the short term study and the higher factors primarily relates to the inclusion of 1984 data. As we have discussed above, we agree that the 1984 data should be corrected, but we cannot agree that it should be ignored, as AT&T proposes in computing its higher factor. That data is part of the historical record and experience under rate of return regulation, and an analysis that ignores it distorts how rate of return has worked in practice. A short term post-divestiture study also necessarily has a limited number of data points for analysis. To suggest total reliance on a short term study, but to exclude a significant part of the available data, is an inconsistent and unreliable approach.

87. AT&T's second study is based upon a computer model developed by AT&T to forecast future price cap and rate of return results for switched access rates.[97] As inputs to the model, AT&T assumes the values for several parameters, principally demand growth, growth in total non-traffic sensitive (NTS) costs, and growth in traffic sensitive (TS) costs per minute. Based upon what AT&T asserts is a reasonable range of values for each of these parameters in the next four years, AT&T then computes a range of what it presents as the likely rates that would occur under both continued rate of return regulation and price caps, using the previously proposed 50-50 price cap formula and a productivity factor of 3.0 percent. AT&T concludes, based upon these assumed parameters and the operation of its computer model, that the Commission's proposal will permit LECs to charge customers approximately $5 billion more over the next four years under price caps than under continued rate of return regulation. It also calculates that the baseline productivity factor should be more than doubled from the Commission's previous proposal and set at 5.90 percent to limit LEC revenues to those AT&T argues would be permitted under rate of return regulation.

88. As with any model, AT&T's results depend upon the reasonableness of both the input parameters and the equations in the model itself. Both have been criticized,[98] and our own review indicates that several of these criticisms are valid and undercut the study's conclusions. For example, this study also discards 1984 data in setting the parameters for likely TS per minute rate changes under rate of return regulation. This single decision has a major effect on AT&T's results. AT&T assumes that TS cost per minute will most likely decline by 1.5 percent per year, based upon 1985-1989 data. But AT&T admits that inclusion of the 1984 data implies a TS cost *increase* of 1.2 percent per year. In comparison with this more complete data set, AT&T's study thus understates likely rates under rate of return regulation by from $1.4 billion to $3.1 billion.[99]

89. AT&T also assumes historically high levels of growth in switched access demand, from 8 to 12 percent with a most likely figure of 10 percent. Although switched access growth has been robust during the post-divestiture period, this growth has been strongly stimulated by the Commission's implementation of subscriber line charges and the resulting rapid decline in the carrier common line rates paid by AT&T and other interexchange carriers. Long distance rates declined by an unprecedented 40 percent during this period even without adjustment for inflation. Other exogenous changes also helped reduce rates (*e.g.*, the removal of inside wire costs), and the economy was consistently growing throughout this period. While AT&T does include some adjustment for these factors, it appears likely that its

growth parameter is still overstated. AT&T itself used a lower range of growth projections in comments filed only last year, and there is no apparent basis for increased demand growth now.[100] In fact, the recent slowing of the national economy suggests that demand growth is likely to be more sluggish in the next few years, and will more likely be in the range of 6 to 10 percent claimed by USTA. Overall, we do not believe AT&T's prospective studies provide a sufficiently reliable foundation for its projections of likely future rates under rate of return regulation.

90. *Long term historical studies.* The 3.0 percent productivity offset proposed in the earlier Notices was largely based on long term historical studies of pre-divestiture Bell System productivity growth. To explore the validity of these studies, Commission staff performed an additional long term study, measuring productivity indirectly between 1928 and 1989. That study indicated that the telephone industry had exceeded total industry productivity growth by 1.7 to 2.0 percent during this period. It also concluded that high or rising inflation was associated with relative prices that fall below the average trend line.[101]

91. We have examined the comments filed regarding the long term study and revised the study to reflect valid suggestions and criticisms. The revised long term study is included in this Order as Appendix D.

92. There are two major revisions. First, the 1.7 to 2.0 percent productivity figure reported in the initial study applied to all telephone services, not to the interstate access and interexchange services that will be subject to price caps. The revised study examines intrastate and interstate usage patterns and concludes that the more rapid growth in interstate usage results in higher apparent interstate productivity growth. The study concludes that the historical productivity target should be raised by about 0.3 percent to account for the estimated historical interstate growth trend of 6.4 percent. The estimated long term interstate productivity offset would thus rise from the initial 1.7 to 2.0 percent, up to 2.1 to 2.6 percent. Our best estimate is 2.25 percent.[102]

93. Second, the revised study calculates the first step of revisions necessary to express this productivity offset in conformance with the formula for common line. As we discussed above, the correct productivity offset is directly related to the chosen formula. In Appendix D, we compute the long term historical productivity offset in terms of the per line formula, simply to establish a benchmark that is consistent with rate of return regulation as we applied it in the past, and adjust it for differences in demand growth.

94. To obtain a per line productivity offset, the long term historical productivity offset (between 2.1 and 2.6) would be reduced by about 0.67 percent, giving a final per line best estimate of 1.68 percent.[103]

95. With this information we can compute the range for the productivity offset implied by the long term study, using the Balanced 50-50 formula. Because the Balanced 50-50 formula gives part of the benefit of demand growth to LECs, while the per line formula does not, it requires a productivity offset that is about 0.51 percent higher than per line based upon the calculations in the short term study.[104] The best estimate of the productivity offset is thus about 2.1 percent.

2) Selection of the offset

96. In the *Supplemental Notice*, we observed that the short term and long term productivity studies appeared to yield significantly different baseline productivity offsets.[105] We requested comment on whether the two numbers could in fact be reconciled. Despite the numerous corrections and refinements we have made to both studies, a significant gap remains. Using a Balanced 50-50 formula to cap common line, the best estimate of a unitary offset in the short term study is a 3.5 percent factor, and the best estimate in the long term study is a 2.1 percent factor. Had we decided to remain with the previous common line formula proposal, the offsets associated with each study would have been higher.[106]

97. In the Notice, we had relied on long term studies to select the proposed productivity offset. On further reflection and examination of the record, we now believe it is reasonable to give substantial weight to the two staff studies of LEC productivity. Each has it strengths and its limitations. The strengths of the short term study include the fact that it is the only study that adjusts for exogenous effects of both cost and demand changes. It represents the most recent and thus potentially the most relevant period for assessing trends in the next four years. It focuses directly on interstate switched access prices and demand. Its limitations include the fact that it is based upon a limited set of data points and a single, prosperous economic period, during which no recession occurred. It does not include special access productivity. Its outcome is quite sensitive to the inclusion or exclusion of a single year and depend upon highly complex adjustments to the raw data to adjust for the many important and substantial exogenous factors and events since divestiture.

98. The strengths of the long term study, by contrast, are that it encompasses a longer series of data from a range of economic conditions. It provides more stable results, less subject to economic variations and short term events. It is consistent with other telephone productivity studies in the record, and includes effects of special access. On the other hand, this study also requires assumptions and estimation, for example, to derive interstate productivity from the total industry numbers. It does not adjust for exogenous cost changes since divestiture, or for changes in profits over time. It in effect weights pre-divestiture Bell System data more heavily than the post-divestiture experience of the RBOCs and other LECs.

99. Overall, we feel compelled to recognize the numbers produced by the two studies as representing not specific numerical results, but as likely outcomes within a range of possible values. We do not believe it would be prudent or reasonable to place exclusive weight on either study, or to ignore the evidence each provides. Thus, in setting the productivity offsets, we have selected a conservative minimum figure within the range between the two studies but subject to a tightened no-sharing zone. In our judgment, a baseline productivity offset of 2.8 percent fairly balances the results of the two studies. We have then adopted a more aggressive baseline productivity factor, 3.8 percent, exceeding the figure produced by the short term study, if a LEC opts to take advantage of a 200 basis point no-sharing zone. We have thus effectively bracketed the results of the short term study, but tempered the minimum required productivity offset (before addition of the CPD) in light of the uncertainty in any short term study and the conservativism suggested by the long term study.

100. Taken together with the revised common line formula, the minimum required productivity offset figure represents a substantial, 40 percent increase in the plan's productivity hurdle.[107] When the Consumer Productivity Dividend of 0.5 percent is added to assure that the first benefits of price caps flow to customers in the form of reduced rates, the total productivity offset to be applied by the LECs moves to 3.3 percent. When taken together with the added rate reduction incentives and requirements in the backstop mechanism, this productivity factor should produce substantial benefits to ratepayers in the form of lower rates.[108] While it also establishes a more difficult productivity challenge for the LECs, we judge from the record in this proceeding that it remains a challenge they can meet and, given substantial profit incentives, exceed.

101. In setting the factor at this level, we also have taken into account the narrowing of the no sharing zone from 1 percent to 2 percent, unless the LEC sets rates at the higher, 4.3 percent productivity offset. This additional feature of the price cap plan should encourage LECs to set prices at a level even below the factor suggested by the short term study. Over the course of the plan's initial four years, we expect that on an industry-wide basis, the actual productivity offset will be between 3.3 and 4.3 percent for the companies subject to price caps.

102. There is no credible evidence that the productivity of the RBOCs and GTOC has varied so substantially that separate offsets are necessary to ensure that the benefits of lower rates are realized from the productivity offset and Consumer Productivity Dividend.[109] This is particularly true in light of the higher productivity hurdle we adopt in this Order. To the extent any significant variations in historical productivity are carried into the price cap system, customers will be protected by the backstop mechanism to share earnings of individual LECs that experience higher than average productivity growth. This mechanism should assure that ratepayers of each individual LEC will benefit from price caps.

3. Small and mid-size company productivity

103. Throughout this proceeding, the Commission has expressed concern that assigning one productivity factor on a mandatory basis to all the LECs, regardless of size, could prove unduly burdensome for smaller and mid-size telephone companies. In the *Second Further Notice*, for example, the Commission acknowledged that small and mid-size companies may have fewer opportunities than large companies to achieve cost savings and efficiencies.[110] Unfortunately, the Commission was hindered by a lack of sufficient evidence from which to determine whether a different productivity factor was appropriate, and if so, how to calculate it and to whom to apply it. For this reason, it proposed to make price caps voluntary for small LECs, and mandatory only for large and mid-size LECs.

104. We believe the productivity factor we have selected, 3.3 percent including the CPD, is a reasonable productivity goal for the RBOCs and GTOC. As we have discussed in the previous section, the 3.3 percent offset is based on our study of Tier 1 carrier productivity, relying mostly on RBOC and GTOC data and adjusted downward to account for long term productivity measures. Nevertheless, the evidence accumulated in this proceeding casts doubt on whether all carriers below the largest eight in size can reasonably attain the productivity goal required by the price cap index.

105. We will not, however, mandate a lower productivity factor for mid-size Tier 1 LECs, or small LECs. Despite the most recent efforts of small and mid-size LECs to demonstrate in various studies that their operations are less productive than the largest LECs, the range of values in these studies, the remaining questions about the studies' reliability, and the diverse characteristics of smaller LECs, lead us to conclude that it is at best premature to mandate either overall or individual productivity factors for them.

106. To accommodate this problem, but maximize the benefits of the price cap plan, we further conclude that price caps should be voluntary for small and mid-size LECs, as LEC representatives generally request.[111] Making price caps optional for LECs smaller than the big eight largely moots the risk involved in attempting today to determine what an appropriate productivity factor would be for this group of carriers. Moreover, to ensure that all LECs and ratepayers will enjoy the benefits of price cap regulation, we will revisit the issue of determining an appropriate productivity offset for small and midsize LECs. [112] In the discussion of eligibility issues, *infra*, we explain our decision to apply price caps on a mandatory basis solely to GTOC and the seven RBOCs. Our discussion in this section focuses on the record concerning small and midsize LEC productivity.

107. Small and midsize LECs requested that price caps either be voluntary for them or that a separate, lower factor be set. Some additional studies were submitted with a range of indicated factors. While these studies are not conclusive as to small and mid-size company productivity, they do provide enough evidence to warrant caution in applying the same high standard to these LECs as to the largest eight. The record on independent LEC productivity includes a variety of long and short term studies that use different methodologies and produce different results. One early long term study, performed by Christensen, covers the 1947-1979 period and compares the total factor productivity (TFP) of the Bell System with that of the independents. The results of this study show an average of 1.3 percent lower productivity between the independents and the Bell System.[113]

108. By contrast, other studies performed by independents focus on short term productivity in both the pre-divestiture and post-divestiture period, using TFP or indirect TFP methodologies and show results that differ from the Christensen study. CBT, for example, performed four TFP studies. The first, covering the period from 1972-1979 was a two-factor TFP study[114] in which CBT concluded, similar to Christensen, that the productivity differential between the Bell System and its own independent operation was 1.3 percent.[115] Performing a three-factor productivity study over the same time period, however, CBT determined that only a 1.1 percent differential existed.[116] Later, CBT conducted another study, this time using indirect TFP methodology over the period 1984-1988, and found that a 3 percent differential existed between the productivity of its own operations and that of the RBOCs.[117] Finally, CBT performed a TFP study over the years 1984-1987 and found that its own productivity was 1.92 percent, approximately one percent lower than the TFP for the RBOCs.[118]

109. SNET and Rochester performed similar studies. Covering the period 1972-1979, for example, SNET conducted a two-factor productivity study and found that a differential of 4.4 percent existed between the Bell System

and its own productivity. However, performing a three-factor study over the same period, SNET found that the differential was 1 percent. Rochester also performed a three-factor productivity study over the years 1984-1989 and found that a 1.78 percent differential existed between the Bell System and its own operations.[119] Most recently, NERA performed a productivity study over the 1984-1989 period on behalf of USTA, in which it applied certain critical assumptions used in the Frentrup-Uretsky study of post-divestiture LEC productivity. NERA determined that a differential of between 1.65 percent and 2.77 percent existed between independent LEC productivity and the productivity of the rest of the industry.

110. These studies are useful indicators of mid-size LEC productivity. However, even if valid, they provide no clear basis or figure for a single productivity factor for mid-size companies as a group. Some small carriers state that, as a class, they are more volatile than larger LECs, but they do not provide us with data to confirm this observation.[120] Indeed, we are left to speculate on how the conclusions that we reach in regard to the productivity of other groups of LECs might apply to these companies. We note that some small companies apparently do not have records that are sufficient to compile a reliable productivity history[121], and that, in some instances, productivity records may not exist at all. Accordingly, we have no real guidance that would enable us to set a productivity number for these carriers.

111. Although the studies performed by mid-size carriers such as CBT, SNET, or Rochester, may be valid as "stand-alone" analyses of their separate operations, we cannot comfortably extend their results to describe the performance of other mid-size carriers. We believe that the independents are too diverse in terms of geography, business organization, historical growth rate, customer and resource base, and much else, to assume that the studied capability of CBT or SNET or Rochester, can serve as a model to predict accurately the future productivity of mid-size LECs as a class. This is particularly true of those studies performed by CBT and SNET that do not consider productivity in the post-divestiture period and thus do not take into account the many changes that occurred in the industry at that time that affected mid-size LECs.

112. The USTA study submitted in the most recent round of comments is also questionable as a predictor of the future productivity of mid-size companies. While it is true that the USTA study makes use of certain assumptions that are employed in our own study of post-divestiture productivity of large companies primarily, this alone does not ensure that the results can reliably account for the claimed productivity difference of smaller companies.

113. In our evaluation of baseline productivity for the largest eight LECs, we were unwilling to place exclusive weight on our own short term study, especially in light of the short time period that it covers and the possibly unusual economic conditions that are attendant to it. The same caution applies with even more force to USTA's study. The smaller size and geographical differences between large and smaller companies is likely to result in random differences, especially in a short study, like USTA's. USTA does not claim or perform the relevant calculations to demonstrate that its results are statistically significant and are not simply random, or that the results are relatively consistent for the various individual companies in its study. We further note that the important data point of 1990 that is presently included in the corrected Frentrup-Uretsky study, is not considered in USTA's analysis. In our analysis, we note that we found that the addition of the 1990 data point raised the productivity offset. It seems likely that USTA's results could be similarly affected.

114. The range of possible differentials greater than 1 percent also suggests the difficulty in attempting to establish a mandatory standard for these companies. The record evidence does suggest that, in general, productivity for mid-size and smaller LECs might be either equal to or lower than that for the RBOCs and GTOC.[122] Thus, LECs for whom price cap regulation is voluntary are not likely to be able to "game" the system by opting in only if they know they are more productive than the productivity offset embedded in the price cap formula. The obvious and inherent difficulties in the present record concerning the quantification of a mid-size LEC productivity factor support our decision to grant mid-size and small companies the option of voluntarily participating in price caps.

115. In addition to the submission of quantitative studies on the subject of mid-size LEC productivity, the alleged lower productivity of these LECs compared to that of larger LECs has been the subject of much qualitative speculation in this record. For example, the reduced capacity of the mid-size and smaller LECs has been accounted for by commenters who say that the problem is that such LECs are more volatile in their business organizations than the RBOCs or GTOC, and that this affects their productive capabilities.[123] Others argue that the economies of scale of the smaller LECs are also smaller, and that this fact accounts for their reduced productivities.[124] Still others cite lower historical growth or geographical limitations that prevent small and midsize companies from achieving higher productivity levels commensurate with those of larger LECs.[125]

116. The points raised by commenters underscore the difficulty of discerning a uniform pattern of small and mid-size LEC productivity from this record. That is, since the foundations of productivity vary from company to company, and since the variation in terms of size, resource base, and geography among independents is so wide, the pitfalls associated with choosing one mandatory productivity number to apply to all such companies are manifest.

117. The study submitted by CBT illustrates our dilemma in attempting to translate the productivity experience of one midsize company to another, let alone to the entire class of small and mid-size LECs. CBT's lower projected productivity relative to the BOCs, for example, could be based on low interstate usage while another mid-size company, say PRTC, might have a lower productivity based on costs associated with providing basic universal service. While both CBT and PRTC may have lower productivity than the larger LECs, the point is that the bases of their lower productivity may be so different that the experience of one cannot reliably be used to justify the productivity "treatment" of the other. That is, since the fundamental forces that will define the productivity of CBT and any other company are so different, the basis for the development of a single productivity factor for all small and mid-size LECs is not obvious from CBT's study. As we stated in the *Supplemental Notice*, the experience of a single mid-size company cannot, under

these circumstances, reasonably form the basis for a policy judgment affecting an entire segment of the industry. However, with so many questions still left unanswered in the record, we believe we are well advised to allow the mid-size and small companies the freedom to choose whether or not to participate in price caps at this time instead of attempting, without a more complete record, to determine one productivity factor for them all.

118. The problem remains how to group the class of small and mid-size LECs meaningfully, in a way that allows development of a particular productivity offset for them that will be reasonably achievable by all members of the group. The parameters of a LEC's productivity, as we discuss above, are quite varied. It may be that one of these parameters has more relevance to a carrier's productivity than another. We add that the option of applying an individual company productivity offset for each mid-size or small company would obviously become an onerous administrative burden that we cannot seriously consider.[126] Similar to the rate of return process in which we pick a single cost of capital for all classes of LECs, we must limit ourselves to pursuing a course of action that is administratively feasible and at the same time reasonable under the circumstances.

119. As we have discussed, there are a number of issues requiring further exploration before we can select a productivity offset tailored to the midsize or smaller companies. In the meantime, to accommodate the known and unknown productivity differences among small and mid-size companies, we take the reasonable course to make price caps mandatory only for the RBOCs and GTOC.[127]

4. Sharing and adjustment mechanisms

a. Summary

120. The challenging productivity factor we have selected is designed to generate lower rates for customers while offering LECs a fair opportunity to earn higher profits. However, we recognize the possibility that, despite the extensive record that has been developed and the careful analysis to which it has been subjected, it is difficult to determine a single, industry-wide productivity offset that will be perfectly accurate for the industry as a whole or for individual LECs or market conditions at a given time. The calculation of historical productivity that underlies the productivity factor for the LEC industry as a whole is complex and contentious. Individual LECs may experience significant variations from the industry productivity norm, not because of their own foresight and efforts but as a result of regional economic booms or recessions, among other factors. These possible sources of errors in the productivity offset support the adoption of a backstop program (at least until we acquire additional experience with LEC price caps), to adjust rates in the event that such unanticipated errors in the price cap formula occur.

121. In fashioning the backstop plan for LEC price caps, we have sought to balance competing goals. On the one hand, the benefits of increased productivity promised by the price cap program depend upon the creation of new profit incentives for the LECs. A backstop mechanism may dampen the LECs' risks and rewards and thus reduce the incentives of a "pure" price cap plan. On the other hand, any price cap plan must be consistent with the goals of the Communications Act, assuring just and reasonable rates and the continued availability of quality services. A backstop mechanism can help ensure that the plan fairly shares the risks and rewards of future productivity gains between the LECs and customers, even in the unpredictable and varying circumstances of future years. A backstop mechanism can also serve to ensure that application of the formula does not subject any price cap LEC to depressed earnings over an extended period of time that could impair such a LEC's ability to provide quality service to local subscribers.

122. The sharing plan we adopt in this Order is comprised of three components, which together should achieve the proper balance of high efficiency incentives and greater assurance of reasonable rates and quality service. The operation of the sharing plan should also respond to concerns about the validity of applying a single productivity offset to a number of LECs.

123. The first component of the plan is a "no sharing zone" wherein a LEC whose rates are below the PCI will, assuming its rates are not otherwise found to be unlawful, be entitled to retain all of its earnings up to 12.25 percent, 100 basis points above the 11.25 percent rate adopted today in the companion *Represcription Order* in Docket 89-624. This no sharing zone should act as a potent incentive and reward for the LECs to achieve efficiency gains and outperform the 3.3 percent productivity offset embedded in the price cap plan.

124. The second component of the sharing plan is a "50-50 sharing zone" wherein LECs complying with price cap regulation will be required to share with consumers 50 percent of their earnings between 12.25 percent and five percentage points above the 11.25 percent rate of return, or 16.25 percent. This level of sharing will ensure that consumers receive their fair share of productivity gains that occur, just as they would in an industry with keener competition. The customer share plus interest will be returned in the form of a one-time reduction in the PCI for the next rate period, calculated in the same manner as other exogenous changes in the formula.

125. The third component of the plan is a zone wherein LECs are required to return 100 percent of their earnings in the form of lower rates to the extent earnings exceed 5 percentage points above the rate of return. Based on the 11.25 percent rate of return we adopt today in the companion *Represcription Order*, this zone begins at 16.25 percent. When taken together, these three components making up the sharing plan effectively allow a LEC complying with the price cap rules, maximizing its efficiency and productivity efforts, and succeeding in the marketplace, to reach a maximum 14.25 percent rate of return, using a productivity offset of 3.3 percent and setting its prices at or below the PCI.

126. In addition, in order to establish a strong incentive for upfront rate reductions, the price cap plan and sharing plan we adopt today also embody the concept of providing a profit incentive for the LECs to further reduce rates below what the PCI would otherwise require. Such a concept was initially proposed by United in its Reply Comments.[128] Under our adaptation of the United concept, a LEC that elects to set its PCI and prices using a productivity offset of 4.3 percent, thereby effectively reducing its rates by an additional 1 percent, may retain a larger percentage of its earnings above the 11.25 rate of return than it could with a 3.3 percent productivity offset. With the greater initial price cuts to customers based on the higher productivity offset of 4.3 percent, the no sharing zone is increased to 13.25 percent; the 50-50 sharing

zone is between 13.25 percent and 17.25 percent; and the zone requiring carriers to return all earnings begins at 17.25 percent. As such, in electing to reduce prices to a level reflecting a 4.3 percent productivity offset, a LEC entitles itself to try to reach an effective maximum 15.25 percent rate of return. This potential for increasing earnings that can be retained should provide a substantial financial incentive for LECs to improve productivity further and to reduce rates upfront, thereby providing ratepayers with immediate and permanent benefits of such productivity gains. For LECs electing the higher productivity target, the PCI will be adjusted downward to reflect the higher productivity effect, but only that year. In future years, a LEC electing to take advantage of this alternative by reducing rates 1 percent below its PCI may return to a 3.3 percent productivity offset. In such a case, however, the operation of the sharing plan on earnings levels would also revert to those levels applicable when rates are set at a productivity offset of 3.3 percent.

127. We are also adopting a modified version of our proposed lower stabilizer or low end adjustment mechanism in order to ensure that the application of the price cap plan does not subject any individual LEC to such low earnings over a prolonged period that its opportunity to attract capital and ability to provide service are seriously impaired. If the earnings of a LEC whose rates are below the PCI fall below the lower adjustment mark in a base year period, it is entitled to adjust its rates upward to target earnings to an amount not to exceed the lower mark, using the prior period as the baseline. This limited upward adjustment should ensure that the LEC will remain healthy and able to provide needed services, while retaining substantial incentives to take the action necessary to improve its performance and thereby raise its earnings above this minimal level. While we will not require a specific showing of need or efficiency, we of course retain our authority and responsibility to examine the management of the LECs to ensure that the low earnings do not indicate mismanagement, fraud, or other misbehavior. We will set the lower adjustment mark at 10.25 percent, to be symmetrical with the 12.25 percent top of the no sharing zone.

128. These backstop sharing and adjustment mechanisms are adopted as rules pursuant to Sections 201 through 203, and as a prescription pursuant to 205(a), and 4(i) of the Communications Act. Except as provided below, proposed rate changes that fail to comply with these rules (*e.g.*, rates that fail to incorporate rate reductions mandated by earnings in the 50-50 sharing zone or all sharing zone, or rates that are based upon an improperly calculated PCI or that do not accurately reflect the computed rate reductions) will be subject to rejection or other appropriate corrective action. In addition, to the extent they become effective, rates that fail to comply with these rules will be subject to enforcement action appropriate to correct the violation of a prescription under Section 205(a), including forfeitures, or complaints under Section 208. In light of our prescription of the sharing and adjustment mechanisms, complaints claiming that overall company earnings that comply with the sharing mechanism are excessive in view of costs will not lie. Since our sharing mechanism does not relate to specific rates, however, complaints that particular rates are unjust and unreasonable in light of the relevant costs and profits, or that they are discriminatory, may continue to be filed.

129. In order to provide a reasonable period in which to review the operation of the price cap plan, we anticipate continuing the earnings levels in the backstop at the levels adopted here, for at least the initial four year price cap period, absent a compelling reason to adjust them.

b. Development of the sharing and adjustment mechanisms

130. The backstop mechanisms we adopt here are based on our review of the extensive record developed in the course of this proceeding. The results of that review are, we believe, mechanisms that are superior to those proposed in the earlier stages of this docket.

131. The *Second Further Notice* invited comment on a backstop mechanism which that Notice described as an "automatic stabilizer."[129] That mechanism would have required an automatic adjustment in a particular LEC's PCI if that LEC achieved a rate of return for an annual price cap period that differed from the target rate of return prescribed for LECs that are not subject to price caps by more than 2 percent.

132. The *Supplemental Notice* invited further comment on the size of the earnings differential that would trigger a PCI adjustment and on the mechanics of a backstop mechanism. That Notice also tentatively concluded that the automatic stabilizer should be supplemented with a requirement that price cap LECs share with customers earnings above a certain level; the amount to be shared increased in proportion to the amount earned.[130] We did not specify a particular level at which sharing would begin, or the percentage to be shared. We did propose, however, that the final sharing step continue to provide incentives for carriers to become more productive by permitting LECs to retain some percentage of the base year earnings. We sought comment on a set of related issues: whether to establish a step at which ratepayers would receive 100 percent of any additional earnings; any legal issues raised by this plan; whether to integrate the sharing requirement into the price cap index calculation or identify the shared amounts with particular customers; and whether to base adjustments on the LEC's total interstate earnings or on a more subdivided cost allocation system. We requested that comments on the parameters of the earnings level to serve as the prescribed starting point be submitted in the pending rate of return represcription proceeding, CC Docket No. 89-624. These earnings level questions will be discussed in the next section of this Order.

133. In response to these notices and proposals, numerous interested parties submitted a wide range of proposals for backstop concepts and mechanisms, as well as comments debating the need for backstops at all. Some of the LECs contend that no backstop is necessary or desirable, because the record adequately established that the then-pending 2.5 percent (plus the 0.5 percent CPD) requirement was a challenging productivity figure, and there was no need for a stabilizer to protect against error.[131] These contentions are not compelling, and are refuted by the evidence of record.[132] Long term productivity studies demonstrate year-to-year fluctuations in industry average productivity. Moreover, even if historical productivity did not vary significantly, it is difficult to predict reliably the extent of the productivity gains that a price cap plan may encourage and make possible. A backstop plan provides a practical mechanism to ensure that the benefits of price caps are fairly distributed, in a

way that an *a priori* productivity factor cannot. The backstop is especially useful in the initial stages of price caps to guard against unforeseen occurrences.

134. Many of the LECs also contended that the combination of an upper stabilizer together with the sharing of high earnings is overly complex, unnecessary, and contrary to the purposes of incentive regulation. For example, LECs argued that the permanent effect of the upper automatic stabilizer, based upon a single year's earnings, created perverse incentives; they said that a LEC might seriously hurt itself by having a particularly productive year.[133]

135. The modifications we have made to the proposed backstop mechanism, including the elimination of a separate upper stabilizer or adjustment mark, have effectively addressed these concerns, to the extent they might have been valid. The mechanism we are adopting is simpler and more flexible than the earlier proposal. For example, the backstop for high earnings levels is a single, integrated mechanism, not the two separate mechanisms we were considering. It also calculates only one adjustment in the following year's PCI, rather than two. The LEC decides for itself whether to lower rates immediately; if it does so, the upfront rate reductions will have much the same effect as the next-year reductions required by the sharing plan, but will more immediately and effectively benefit both the LEC and the public. A LEC electing this option will have an even stronger positive incentive to improve productivity, because the hurdle it must clear to benefit from the higher sharing threshold is also made higher. Its risk will pay off only if it achieves much higher productivity. Nevertheless, it provides the protection to customers of both a stabilizer and sharing. If the LEC chooses not to reduce its rates below the PCI, the ratepayers will enjoy a substantial share of any earnings in the 50-50 sharing zone and "all sharing" zone in the following year.

136. Furthermore, the sharing mechanism operates only as a one-time adjustment to a single year's rates, so a LEC would not risk affecting future earnings, as it would in the case of the stabilizer we had previously considered. The additional profit incentive created for LECs that elect a 4.3 percent productivity incentive will have a permanent effect on the LEC, because the higher factor will be reflected in the LEC's PCI in future years. But the LEC can return in a subsequent year to a 3.3 percent factor, with the stricter sharing limits.

137. This backstop should produce positive, not perverse, incentives. The LEC itself selects whether to reduce its rates upfront to reflect a 4.3 percent factor. It is unlikely that any LEC will be able to achieve productivity gains of a magnitude that would generate earnings above the 50-50 sharing zone within the initial four year price cap period. But in that case, the LEC will experience an even stronger incentive to reduce rates based on a 4.3 percent offset, in order retain a portion of such profits.

138. At least for the initial period of the plan, we have decided to limit the LECs' choice of a productivity offset to either 3.3 or 4.3 percent. In its proposal, United suggested that LECs could set rates at any level below the PCI, and a corresponding increase in the no sharing zone and in the percent sharing obligation could be computed in the next annual filing.[134] Implementation of this proposal would be administratively burdensome. We believe our approach provides sufficient flexibility to the LECs.

139. Allowing a simple choice between either a 3.3 percent or 4.3 percent productivity offset avoids these problems. Virtually all of the price cap mechanisms will work in just the same way regardless of the offset level. While the choice of offsets is obviously more restricted, we judge that this limited choice will also be easier to administer and monitor, at least during the initial four year period. The one additional issue we foresee involves occasions when a LEC changes its offset from one year to another. This change would take effect at the beginning of an annual rate period, July 1 each year. However, by the time the next annual rates would be due for filing, the actual earnings results to compile sharing amounts under those rates would not yet be known -- at best, only six or eight months' data would be available. This problem should be manageable, but may require development of averaged or split year reports or sharing. We direct the Chief, Common Carrier Bureau, to develop a reasonable method to address this issue, and delegate him the authority to implement such method.

140. Some LECs contend that, if any sharing or stabilizer plan is judged necessary, the amount of sharing should never be above 50 percent, arguing that higher levels of sharing discourage higher efficiency.[135] LECs who contend that sharing should never exceed 50 percent cite literature on taxation, arguing that tax rates above 50 percent are deleterious to productive work effort. Others propose tapered sharing beginning with 25 percent refunds and rising to 75 percent.[136] Virtually all LECs commenting on the issue contend that sharing should always be less than 100 percent to retain efficiency incentives at all earnings levels.[137] An exception is Lincoln, which urges that the proposed separate sharing and stabilizer mechanisms be replaced by 100 percent sharing above the upper stabilizer mark.[138]

141. Interexchange carriers and other customers, in contrast, frequently support stringent limits on earnings and 100 percent refunds at some level. MCI, for example, proposes 50-50 sharing of earnings up to 0.5 percent above the industry rate of return and a 100 percent refund of any higher earnings.[139] AT&T proposes either a simple rate freeze with no stabilizer or sharing, or a stabilizer at 0.25 percent above the industry rate of return combined with 50-50 sharing of earnings above that level.[140] Aeronautical Radio, like Lincoln, supports 100 percent sharing of all earnings above the formula adjustment mark.[141]

142. Other commenters propose forms of "inverted" sharing mechanisms, with customers receiving a higher share of earnings immediately above a benchmark, and a lower share of higher earnings. NASUCA contends, for example, that inverted sharing creates a greater incentive for the LEC to reach the higher point; it proposes that sharing of most or all earnings begin no more than 1 percent above a computed return on equity, and that LECs retain an increasing share of higher earnings, but no more than 50 percent.[142] Under United's plan, inverted sharing would begin at 75 percent for earnings 1 percent above the industry rate of return, but decline by 25 percent for every 1 percent reduction in rates below the year's change in the PCI. Its mechanism would also raise the level at which sharing begins, by 0.4 percent of rate of return for each 1 percent reduction in rate below the change in PCI.[143]

143. The comments also dispute whether a lower formula adjustment mark should be symmetrical with any upper mechanism, but only one commenter questions the usefulness of some backstop at low earnings levels. Some LECs, for example, support a symmetrical lower adjustment as necessary to balance the upper mechanisms,[144] while others request a lower adjustment closer to the prescribed rate of return.[145] California recommends consideration of the lower stabilizer recently included in the California intrastate price cap plan.[146] Executive Agencies also support a symmetrical lower adjustment.[147] NASUCA opposes a lower adjustment. It argues that this "safety net" moves the price cap system away from a market-based system that punishes inefficient firms, and rewards incompetence or profligacy. It also contends that the lower limit provides greater protection to LECs than they receive under rate of return regulation, because the Commission will no longer carefully scrutinize the LECs' rate bases or operating expenses.[148]

144. The mechanism we are adopting balances the contrasting concerns expressed by parties, while helping to achieve positive incentives and just and reasonable rates. LECs retain very strong incentives to be more efficient, and can select for themselves a higher productivity commitment that allows them to retain a higher level of earnings. But to do so they must challenge themselves by setting rates even lower than those allowed by the price cap formula. Any gain in either lower rates or higher profits depends upon achieving higher productivity; any such gain (above the no sharing zone) is shared between LECs and their customers.

145. Within the initial four year price cap period, we believe it is unlikely that LECs can achieve earnings above the 50-50 sharing zone. To do so, the LEC must both substantially exceed the productivity factor established by the PCI formula and substantially reduce rates in compliance with the backstop. It is possible, however, that this could occur because of an unusual error in the productivity offset as it applied to a particular LEC. For this reason, we believe that it is a desirable protection for ratepayers to establish a level of earnings beyond which 100 percent is shared with ratepayers in the form of lower rates. We are not persuaded by LEC comments urging that sharing should not rise to 100 percent, or even above 50 percent, in order to preserve incentives. A rise in earnings to levels of 16.25 percent or 17.25 percent within four years, despite the industry-wide productivity factor and sharing, seems more likely to represent an error in the factor or an unusual variation from the industry norm than newly-achieved productivity.

146. We also conclude that a 50-50 sharing plan is preferable to inverted sharing. As NASUCA points out, an inverted sharing plan does provide a greater benefit to customers at earnings levels just above the target,[149] but this benefit is likely to come at a severe price. An inverted sharing plan creates, in effect, a hurdle for LECs, who would see little immediate reward for the risks they must take if they institute programs to improve efficiency. Any inverted sharing program represents a guess and a gamble that the LEC will not be discouraged from even undertaking such programs, but will instead conclude that it has a reasonable chance of achieving productivity gains that are much higher than the industry norm. We are reluctant to adopt such a speculative and seemingly risky assumption as a universal mechanism for the range of LECs who will or may be subject to price cap regulation. The straightforward trade-off in the plan we are adopting, which guarantees rate reductions to customers while establishing clear, consistent incentives for LECs to strive for all possible efficiency gains, seems to us substantially superior.

147. We also reject arguments that we should never allow adjustments for low earnings. Unusually low earnings may be attributable to an error in the productivity factor, the application of an industry-wide factor to a particular LEC, or unforeseen circumstances in a particular area of the country. Failure to include any adjustment for such circumstances could harm customers as well as stockholders of such a LEC. Unusually low earnings over a prolonged period could threaten the LEC's ability to raise the capital necessary to provide modern, efficient services to customers. Moreover, proper incentives are retained because the lower end adjustment factor takes effect only if the LEC's earnings fall below 10.25 percent. A decline of this magnitude represents a substantial drop in profits for a LEC. And, because the lower end adjustment adjusts the PCI only enough to allow the LEC to earn at the lower end adjustment mark, using the prior period as the baseline, it continues to require that LECs gain in efficiency and productivity if they are to achieve even the average return allowed to them under rate of return regulation. Thus, the lower end adjustment embodies a substantial penalty for LECs who fail to achieve the productivity mark we have set for them.

148. NASUCA, in our judgment, gives too little weight to these objectives when it opposes any lower stabilizer. A LEC with earnings below 10.25 percent is likely to be unable to raise the capital necessary to provide new services that its local customers expect. It may even find it difficult to maintain existing levels of service. Thus, while our lower end adjustment mechanism protects LECs to some extent from errors and misjudgment, it also protects them from events beyond their control that are likely to affect earnings to an extraordinary degree, such as local or regional recessions.

149. More importantly, the lower end adjustment factor protects the goals of universal and quality service in the Communications Act. At the lower adjustment mark, LECs should still be able to operate in a healthy and relatively effective manner, though with small return to shareholders. Because no above-cap rate increases are allowed above this lower bound without a rate case and tariff investigation, any increase in that return should come through improvements in productivity. NASUCA's suggestion that a lower stabilizer provides more protection to LECs than rate of return regulation is also unfounded. The Commission retains the authority to examine LEC operations for mismanagement, fraud, or other misbehavior, though we expect that the incentives embodied in price caps will reduce the need to do so. In practice, though, a close examination of LEC business practices and decisions across the Nation is difficult and likely to second-guess areas of normal business judgment. Under rate of return the result has been that the industry target closely approximates a guaranteed return. Establishment of the lower zone clearly escalates the real risk that LEC earnings will fall below this level, unless LECs achieve at least the productivity objective we have established for them.

150. We believe the backstop mechanism we adopt properly balances LEC concerns that any earnings limitation will dampen or eliminate incentives for productivity,

and customers' concern that they receive a major share of any productivity benefits and lower rates in the short term. The addition of 50-50 sharing to the Consumer Productivity Dividend assures major benefits for customers and still provides LECs with a substantial incentive to achieve greater efficiency. The inclusion of an outer boundary on the sharing zone is not likely to affect efficiency incentives because it is unlikely that any LEC will be able to achieve productivity gains that would generate earnings above the sharing zone within the initial four year price cap period. The alternative adjustment formula will be available to LECs that believe they can achieve greater productivity. The plan as a whole provides very strong efficiency incentives because each LEC can select a productivity goal that determines the level of profits it will be allowed to retain should it succeed in its efforts. To do so, a LEC must challenge itself by setting rates even lower than the rates allowed by the price cap formula.

151. We also conclude that sharing should be based on total interstate earnings. As Ameritech points out, use of a single productivity offset for all baskets is likely to result in varying basket-by-basket returns, because productivity gains by basket will differ.[150] To be consistent with the unitary productivity mechanism, a unitary backstop mechanism is thus appropriate. Calculation of basket-by-basket or service-by-service rates of return and sharing obligations could potentially require sharing even when the LEC has not achieved overall productivity gains that rise above the unitary offset factor, but only higher gains for a single basket or service. The converse problem would arise if the formula adjustment were to be made for individual baskets or services. A LEC could be granted higher rates for that basket even if interstate earnings in other baskets and for the company as a whole were already adequate. Within the initial four year period of the price cap plan, arguments that use of a total company sharing benchmark will allow cross-subsidy[151] or that rates will drift away from costs in an economically inefficient manner,[152] are unpersuasive. Any such calculations would be based on current cost allocation methods that are likely to be misleading for price cap LECs, and are unlikely to provide a reliable test for cross-subsidies or economic efficiency.

152. In addition, and from much the same considerations, we conclude that sharing should be implemented by adjustments to the next year's PCI. This approach will assure that shared amounts are accurately computed, tested in the tariff review process, and passed on to end users. It would be virtually impossible to accurately monitor and audit individual LEC refunds to end users paying subscriber line charges and special access rates and foreign exchange charges, interexchange carriers paying switched and other access charges, and to themselves when they provide interexchanges services. Moreover, the shared amounts will be calculated on the basis of total interstate earnings, as discussed above. Any attribution of amounts calculated on this basis to individual customers for specific services would appear to require a cost allocation mechanism to identify the services entitled to refunds, and the amounts to be refunded. We believe that such an approach would be more complex to administer than the PCI adjustment and would not necessarily offer a more equitable result.

153. Arguments raised in support of individual refunds are unpersuasive or erroneous. Allnet argues in favor of a mechanism that directs refunds to individual customers, based upon "overearnings,"[153] but it does not suggest an allocation mechanism to identify "overearnings." It also raises the spector that a LEC might intentionally create a subsidy flow between customers who were overcharged and customers who were undercharged.[154] Under the mechanism we are adopting, the PCI will be adjusted for all baskets, preventing any intentional subsidy between baskets. Within baskets, pricing bands will provide the same protections in the case of refunds as for other changes in costs. Because the LECs' interstate access customer base is relatively stable over time, no particular customers should be overly advantaged or disadvantaged by this approach. Customers also, of course, retain the ability to challenge any unjustly discriminatory or unduly preferential rate or practice in a complaint proceeding on grounds other than overall interstate earnings of a carrier whose rates are below the PCI and in compliance with the sharing mechanism.

154. Bell Atlantic also supports direct customer refunds, arguing that they "minimize customer inconvenience and confusion" in comparison with adjustment of current rates.[155] Its own example of how this would work, however, supports just the opposite conclusion. Bell Atlantic suggests that the amounts to be refunded to interexchange carriers first be computed based on total interstate access revenue and directly refunded. It claims that this amount would include over 90 percent of interstate access revenues, a total that apparently excludes subscriber line charges. Bell Atlantic then proposes to reflect the balance in an adjustment to the PCI.[156] We do not understand how this approach can be considered more convenient and less confusing than simply applying the full amount to lower the PCI. Moreover, since the interexchange carriers do pay most access charges, Bell Atlantic's method would seem to give them preferential treatment unless some further, unexplained allocation is to be adopted. If interexchange carriers were to first receive direct refunds based on their total intrastate access revenues and then also benefit from the lower rates produced by a lower PCI, they would receive a double refund at the expense of end users. A single adjustment to the PCI appears simpler and fairer.

155. As we gain experience with price cap regulation, we may be able to dispense with the low end adjustment factor. In these initial years of the price cap plan, we believe the low end mechanism's relatively small effect on incentives is warranted by the protection it offers both to LECs against errors in the level of productivity improvement they can achieve and to customers in assuring healthy local companies capable of providing necessary services.

c. Rate of return levels for sharing and formula adjustment

156. In the *Supplemental Notice*, we requested that comments concerning the earnings levels for backstop mechanisms be submitted in the pending rate of return represcription proceeding, CC Docket No. 89-624. For convenience in describing the entire backstop program in one document, we are incorporating into this docket comments filed on that issue in CC Docket No. 89-624, and our decision here reflects consideration of those comments. Unless indicated otherwise, references in this section of the Order are to comments and proposed findings in CC Docket No. 89-624.

157. Most LECs oppose the use of a sharing mechanism at all. They propose that, to the extent sharing is adopted, it begin far above the level (1 percent above the unitary rate of return) that we adopt here. USTA, for example, proposes that sharing not begin until 200 basis points above the unitary rate of return, based on a study of the historical year-to-year variability of telephone industry productivity. The LECs also suggest that any sharing plan should taper, with the obligation to begin at 25 percent and, at higher earnings levels, increase to 50 percent.[157] Bell Atlantic and SWB propose that sharing levels be set with reference to the market-weighted average returns on equity achieved by the S&P 400 firms for the years 1985-88.[158]

158. AT&T, Ad Hoc, and Consumer Coalition generally characterize the LEC sharing proposals as providing returns for LECs that would be vastly excessive.[159] Their opinions are intertwined with their shared view that the Commission's price caps proposal, set forth in the *Second Further Notice* and the *Supplemental Notice*, would, if adopted, allow LECs to earn unprecedentedly high returns without either increasing productivity or reducing rates. Thus, AT&T states that allowing a LEC to earn 200 basis points above the unitary rate or return would impose on consumers unacceptably large potential costs of $1.1 billion a year.[160] Ad Hoc argues that the Commission cannot on the one hand establish a rate of return that carefully balances ratepayer and shareholder interests, and on the other hand authorize earnings 200, 300, or 400 basis points higher. Ad Hoc views the rates that would produce such earnings as violations of Section 201 of the Communications Act.[161]

159. The non-LEC parties also challenge the empirical bases offered by the LECs for their proposals. They all argue that neither the earned returns of the S&P 400 nor the investor-required returns of those companies, upon which the LECs rely, form a rational basis for setting earnings levels for monopoly providers of interstate access service.[162] The sharing proposals of the non-LEC parties are premised on the assumption that the Commission's price cap proposal would, in the absence of a backstop, lead to interstate access rates and revenues substantially higher than those that would have occurred under continued rate of return regulation.[163] These parties argue for much tighter sharing mechanisms than the LECs propose.[164] Ad Hoc states that selection of the sharing level, and the PCI adjustment mark as well, "will by necessity be somewhat arbitrary."[165]

160. The parties devoted relatively little attention to the lower end of the automatic stabilizer proposal that was in the previous Notice, which we have recast as a lower formula adjustment mark. Some LECs insist that the mark cannot legally be set below the lower end of the cost of capital zone of reasonableness, which they generally claim to be 12.3 percent.[166] Other LECs suggest that adjustment marks below a reasonable estimate of the cost of capital would be acceptable in a price caps plan.[167] Non-LEC parties reject the notion that price caps carriers should be allowed to avoid all downside risk by adjusting the PCI whenever they earn below the unitary rate of return.[168] Ad Hoc proposes an adjustment mark at rate of return minus 100 basis points, which is symmetrical with its proposed earnings ceiling.

1) Sharing levels

161. We agree with AT&T and others that the sharing levels proposed by the LECs are higher than necessary to provide incentives for productivity and efficiency. We believe that, notwithstanding the protestations of the LECs, the opportunity to keep 100 basis points of additional earnings will provide an incentive for improving the efficiency of daily operations. However, we find that, contrary to the view of MCI, 100 basis points of additional earnings opportunity alone would not be sufficient to provide incentive for the type of long term, investment-intensive productivity improvements that we hope to see under our incentive regulation plan. As we have discussed above, we conclude that an added incentive to reduce rates, as well as to increase productivity, improves the overall plan.

162. In setting these no-sharing zones, we have concluded that we cannot rely on the USTA study of productivity variability to calibrate sharing levels. First, the study is based only on long term data from the entire telephone industry, that may not be relevant to post-divestiture LEC experience. Second, the logic of using historical variations in productivity to measure the level at which sharing will be required is, in a sense, perverse, since it implies that LECs will be allowed to keep earnings that result from random variations in productivity, but required to return to customers earnings which result from the very kinds of systematic changes in productivity that we are hoping will occur. Similarly, we see no logical nexus between the past variability of LEC earnings under rate of return regulation and the level of earnings that should be allowed in the future under price caps. We also reject the extremely narrow sharing zones proposed by non-LEC parties because to implement these would, as the LECs say, have undermined the notion of having an incentive-based plan at all.

163. In the *Supplemental Notice* we proposed a 200 basis point or 2 percent no sharing zone above the authorized rate of return. In order to improve the benefits of the plan to consumers, while retaining strong incentives, we believe that a LEC should be allowed the full 2 percent no-sharing zone only if it also elects the higher 4.3 productivity factor, thus pressing down rates even further. We conclude that price cap carriers should be allowed to keep 100 basis points of earnings, or up to 12.25 percent, if their rates comply with the price cap rules, including the minimum 3.3 percent productivity offset. Above that, they should be required to share 50 percent of their earnings between 12.25 percent and 16.25 percent with their customers. Earnings above this level are not, in our view, either likely to occur or necessary to provide incentives.[169] Accordingly, we will return all such earnings, beginning at 16.25 percent for LECs who elect a 3.3 percent offset, and at 17.25 percent for LECs who elect a 4.3 percent offset.

2) Lower formula adjustment mark

164. We reject the assertion by some LECs that the price caps plan must allow an upward PCI adjustment whenever a LEC has experienced for one year earnings below the level at which we might reasonably have prescribed the authorized rate of return for non-price caps carriers. In our view, an incentive plan, if it is to truly motivate carriers to break habits formed by "cost plus" regulation, must present more than an opportunity for gain if efficiencies are realized; it must also present the risk of reduced earnings if the carrier fails to control costs

and become more efficient. There would be little such risk if the adjustment mark were set at the prescribed rate of return. Therefore, we will select a level that is below the level of earnings available under traditional rate of return regulation, yet not so low as to cause a confiscatory result in the short term. We also view it as desirable for the formula adjustment mark and the top of the no-sharing zone to be symmetrical, because such symmetry will provide an equal balance of risk and reward over the range of results that we deem likely in the initial period of our LEC price caps plan.

165. We have determined that the no sharing zone should extend to 12.25 percent. If we set the formula adjustment mark symmetrically, it will be 10.25 percent. This level is below the range we have identified for the interstate access cost of capital in the *Represcription Order*, but still within the range of costs of capital for other public utilities. It is also above the marginal cost of long term telephone debt, which is currently just under 10 percent. Such a return is not likely to be confiscatory, because it should still allow most companies to continue to attract capital and maintain service. We therefore conclude that a formula adjustment mark of 10.25 percent will provide the proper balance of incentives and safeguards to our price caps plan. As we have indicated elsewhere, LECs also retain the opportunity to demonstrate on a case-by-case basis that an adjustment in their allowed rate levels will be necessary to prevent a confiscatory outcome.

5. Exogenous costs

166. Exogenous costs are in general those costs that are triggered by administrative, legislative or judicial action beyond the control of the carriers. As stated in the *Second Further Notice*, these are costs that should result in an adjustment to the cap in order to ensure that the price cap formula does not lead to unreasonably high or unreasonably low rates.[170] These costs are created by such events as separations changes; USOA amendments; changes in transitional and long term support; the expiration of amortizations; and the reallocation of regulated and nonregulated costs. Commenting parties sought to add to this list. We discuss below our reasons for treating certain costs as exogenous.

a. Separations changes

167. As with AT&T, we will require an exogenous cost adjustment for changes in interstate costs for LECs that are caused by changes in the Separations Manual. As we explained in the *Second Further Notice*, these changes are imposed by regulators and are outside the control of carriers.[171] We disagree with Allnet's comment that separations changes should be viewed as a cost of doing business and should not affect the cap.[172] Regulatory decisions that are designed to produce just and reasonable rates must affect the cap in order to ensure that the system results in rates that are just and reasonable.[173]

b. USOA amendments; GAAP changes

168. Changes in LEC costs that are caused by changes in Part 32 of our Rules, the Uniform System of Accounts (USOA), will be considered exogenous.[174] We make this classification on the basis that such changes are imposed by this Commission and are outside the control of carriers.[175] However, carriers are not authorized to adjust their price caps automatically to reflect changes in generally accepted accounting principles (GAAP).[176] As explained in the *Second Further Notice*, certain GAAP changes may require amendment to the USOA while others may not. Carriers must notify us of their intention to apply a change in GAAP and we will allow such change if we find it to be compatible with our regulatory accounting needs.[177] No carrier may adjust its price caps to reflect a change in GAAP until we have approved the carrier's proposed change. Furthermore, we wish to clarify that no GAAP change can be given exogenous treatment until the Financial Accounting Standards Board has actually approved the change and it has become effective.[178] The cap mechanism is intended to reflect changes in costs that have occurred, not anticipated cost changes.

c. Transitional and long term support

169. We agree with the telephone companies that argue that changes in pooling support obligations should be treated as exogenous costs. As discussed in the *Second Further Notice*, these obligations, in the form of annual contributions to the Long Term Support Fund and the Transitional Support Fund, were created by the *Pooling Order*[179] and are an essential component of the plan crafted by the Joint Board to permit depooling of the carrier common line access element without endangering the financial viability of small, high-cost telephone companies.[180] Since the Commission has established the obligation to contribute and the formula for determining the level of contribution to be made by a LEC withdrawing from the CCL pool, these contributions are outside the control of carriers and are properly classified as exogenous costs.

170. We grant BellSouth's request for clarification that this rule will apply not only to changes in a carrier's level of contribution but also to changes in amount received under the transitional support phase-down. Changes in the amount contributed and the amount received are direct outcomes of the pooling arrangement approved by the Commission. Since the Commission mandated the arrangement that controls these changes, the changes must be considered as exogenous costs.[181] Carriers that claim exogenous treatment for changes in transitional and long term support will be required to demonstrate the quantitative impact in tariff filings.

d. Reallocation of regulated and nonregulated costs

171. We agree with those commenters that argue that exogenous cost treatment of investment reallocated from regulated to nonregulated use is necessary to give effect to the Joint Cost rules[182] in a price cap environment.[183] These rules require carriers to allocate common plant investment between regulated and nonregulated activities in accordance with a three-year forecast of relative regulated and nonregulated use. The rules are intended to protect ratepayers from the investment risk associated with a carrier's nonregulated businesses by excluding from that carrier's rate base both plant investment currently used for nonregulated purposes and spare capacity intended for future nonregulated use. We note that no party objects to the characterization of these costs as exogenous.

172. As explained in the *Second Further Notice*, under rate of return regulation, these required reallocations translate into reductions in rate base and regulated cost, that in turn produce reductions in regulated rates.[184]

However, under the price cap plan, reallocation of regulated investment to nonregulated activities would not impact interstate rates at all. To register the effect of this reallocation in a price cap context, and thus give effect to the Joint Cost rules, we must require an exogenous cost adjustment to be made whenever regulated investment is reallocated to nonregulated activities.

e. Expiration of amortizations

173. We find that expirations of amortizations to correct existing depreciation reserve deficiencies, which under rate of return would create downward pressure on rates at the time the amortizations expire, should be considered exogenous costs under price caps, as some parties argue.[185] As we stated in the *Second Further Notice*, it would be unfair to ratepayers who are now bearing the cost of the amortization program if rates were not adjusted downward at the end of the program.[186]

f. Access charges

174. Changes in interstate access rate levels that the LECs impute to themselves in the provison of interstate services will be considered as exogenous cost changes that trigger adjustments to their price caps.[187] This treatment is symmetrical to the exogenous treatment afforded AT&T for access charge changes.

175. As we noted in the *Second Further Notice*, we have required those LECs that provide access for originating or terminating their interstate basic service offerings to charge themselves the same tariffed access rates that they charge independent interexchange carriers.[188] While we agree with SBA that the LECs can control changes in the cost of access, the pass through of LEC access costs will not leave LECs without incentives to make their interexchange operations more efficient.[189] Interexchange operations are subject to a separate cap, under the rules we adopt today, and must achieve productivity growth each year if prices are to generate the same or increased earnings. As in the case of all price capped services, by "beating" the productivity benchmark, the LEC can retain higher earnings. Furthermore, if we did not require identical exogenous treatment for both AT&T and the LECs with regard to changes in access, we would risk the creation of an anomalous situation by disrupting the competitive parity we have sought to ensure by requiring the LECs to charge themselves the same rate for access as that charged to independent interexchange carriers. Accordingly, to account for this cost to the LECs, we must treat changes in access charges paid by them as exogenous costs, exactly as we do for AT&T.[190]

g. Tax law changes

176. We find that tax law changes are presumptively endogenous, despite the arguments of a number of LECs that the GNP-PI will not reflect the costs of tax law changes. As explained in the *Second Further Notice*, the GNP-PI is a very broad-based price index that measures changes in all costs --including tax costs -- that affect prices in the economy.[191] To grant LECs exogenous treatment of tax changes that are already accounted for in the GNP-PI would be to "double-count" their effect, a result that is inconsistent with the goals of price cap regulation to encourage cost based rates. Indeed, we have tried to avoid the possiblity of such "double-counting" in our treatment of tax law changes for AT&T by presuming such tax changes to be endogenous.

177. Nevertheless, if there are tax law changes imposed at any level of government that uniquely or disproportionately affect LECs (as a class or individually), LECs may request exogenous treatment. We note that a number of parties appear to advocate this treatment.[192] As with AT&T, the LECs that request exogenous treatment for such changes must overcome the presumption that tax law changes are endogenous.

178. LECs argue that tax law changes should be given expedited treatment as exogenous because they are reflected only gradually in the GNP-PI when they should be recognized at the time they change.[193] The timing and extent to which tax law changes are reflected in the GNP-PI are empirical questions that are unknowable. As stated in the *Second Further Notice*, the flow-through of corporate taxes to prices, and thus to price indexes, has long been a complex and controversial topic in the literature of public finance that cannot, and need not, be resolved as part of this price cap proceeding.[194]

179. Finally, we deny BellSouth's request to provide specific recitation of the various Internal Revenue Code sections that are referenced by a statement that we made in the *Second Further Notice* to the effect that nothing in the price cap proceeding is intended to place carriers in violation of the Internal Revenue Code.[195] Listing some code sections might create the mistaken impression that we have somehow selected certain sections of the code that we do not intend to cover. This is not our intention. Rather, our intention is that no section of the Internal Revenue Code, including those specifically noted by BellSouth, be violated by our price cap rules.

h. Equal access costs

180. We will require that costs of converting to equal access be treated as endogenous. We do not agree with PRTC that endogenous treatment of costs associated with equal access conversion is tantamount to changing the rules on carriers in mid-stream.[196] While it is true that under rate of return regulation, the Commission allowed carriers to recover equal access costs, the necessity for this support, at least for the largest LECs, has greatly diminished. For the largest carriers, conversion has been largely completed, and its associated costs are embedded in existing rates. This being the case, there is little need to encourage these LECs to convert to equal access by treating the costs of their conversions as exogenous. Indeed, we believe that the difficulty of assessing equal access costs, and the corresponding risk that these carriers could willfully or inadvertently shift switched access costs into the equal access category, argues against exogenous treatment of these costs.

181. We are concerned, as are a number of parties, that smaller carriers that have not completed (or indeed even begun) their conversions could be unfairly penalized by endogenous treatment of their conversion costs.[197] However, we stress that our decision to allow annual elections into price caps for smaller carriers is responsive to this problem since it allows them to decline participation in price caps.[198]

i. Depreciation rates

182. We find that cost changes due to changes in depreciation rates are endogenous. While we agree with those LECs that assert that the Commission prescribes depreciation rates, our prescription of depreciation rates is not a reason for declaring these rates exogenous, because the decision of when to deploy or retire equipment is controlled by the carrier.[199] As stated in earlier orders, we are required by the Communications Act to prescribe depreciation rates.[200] To comply with this statutory directive, we have established methods and procedures that provide for full recovery of plant investment on a straight-line basis over the life of the plant.[201] Under this system, a major determinant of the rate of depreciation is the service life of the plant. We emphasize, however, that while we determine the rate of depreciation, we do not decide for carriers when to deploy new plant and when to retire the old. We believe that such decisions are at the very heart of a carrier's business operation, and we do not seek to disturb it. Accordingly, it is not this Commission, but the carrier, through its decisions on when to deploy and retire equipment, that primarily controls the rate at which plant investment is translated into depreciation expense. Based on this reasoning, we decline to give exogenous treatment to cost changes due to changes in depreciation rates.

183. Our conclusion is consistent with the concept of incentive regulation. As the Commission explained in the *Second Further Notice*, if we were to guarantee recovery of depreciation expense for carriers, we would risk destroying the very incentives that we wish to create with the price cap program. Specifically, the idea behind price caps is to provide carriers with the proper incentives toward efficiency and productivity. Since a carrier's decision about how and when to deploy new plant is fundamental to these objectives, if we were to guarantee depreciation expense, we would distort the carrier's business process.[202] That is, we believe that carriers should decide to replace plant when it is economically prudent to do so, and should not base this decision on depreciation accounting. If carriers are required to live with the depreciation rates that result from their investment decisions, we believe that we can reasonably assume that they will make decisions that will enhance productivity in the long run.[203]

184. We further reject the contention of some carriers that current depreciation rates do not provide sufficient capital to fund the rapid modernization of the network,[204] or that the Commission should adopt an "economic life" as the standard for the calculation of depreciation rates under the Part 32 Rules.[205] While it may be true, as some LECs contend, that technological obsolescence due to consumer expectations and demand is reducing the "useful life" of their assets much faster than physical obsolescence, determining the most appropriate standard for calculating depreciation rates is beyond the scope of this proceeding.

185. We note that our decision to view cost changes due to changes in depreciation rates as endogenous is not inconsistent with our decision to require a downward adjustment in the price cap index to reflect expiration of current reserve imbalance amortizations.[206] As we observed in the *Second Further Notice*, the need to amortize depreciation reserve deficiencies was created, not by past decisions of the Commission regarding what plant lives should be, but by past methods of calculating depreciation expense. We explained that, formerly, the Commission used methods that caused reserve imbalances to develop when carriers accelerated the retirement of plant.[207] Now that the problem has been corrected through the use of amortizations that represent depreciation expenses that would have been included in rates over many past years if the Commission had been using our current methods all along, it is clear that there is nothing that carriers can do that will have any impact on the progress and expiration of these amortizations. This is in contrast to carriers' role in controlling depreciation expense. Accordingly, we do not believe that treating depreciation expense and reserve amortization differently produces inconsistent regulatory policy.

186. We are also unpersuaded by the argument raised by some LECs that those carriers that have been granted represcriptions during 1989 will be at a significant advantage at the beginning of price cap regulation because up-to-date depreciation rates will be included only in existing rates.[208] During any time over the three year period in which a particular depreciation rate is in operation, a party may come to this Commission and show reason for a mid-course adjustment in its applied depreciation expense.

187. Nor do we believe that the suggestion of NY PDS to bifurcate the treatment of depreciation rate changes, treating pre-price cap investments exogenously and post-price cap investments endogenously, should be adopted.[209] As Pactel notes, requiring different exogenous treatment depending upon when assets were purchased would be an administrative nightmare even if sufficient records existed to accomplish this purpose.[210] More importantly, for reasons that we have discussed above, the regulatory treatment of costs associated with depreciation rate changes is based on the LECs' control over their depreciation expenses without regard to time period.[211]

j. AT&T point of presence migration

188. We do not agree with United and TUECA that point of presence (POP) migration should be treated as an exogenous cost.[212] More specifically, we are unpersuaded that, as TUECA alleges, such migration is not a "normal part of everyday business" or that, as United argues, exogenous classification merely reflects the cost shifting that occurs with migration when investment classified as non-access must be reclassified as access (and allocated to the access transport element). On the contrary, we believe that the risk of stranded investment is a common business risk that the LECs must plan for and attempt to avoid. Moreover, if we were to allow exogenous treatment of POP migration, we would be removing any incentives that the LECs might have to reduce access costs to levels that would discourage uneconomic bypass.[213] This would be contrary to the goals of the price cap program.

k. Other

189. We reject the suggestion of some carriers that we add an exogenous cost factor for uncontrollable "extraordinary" costs that result from natural disasters or for cost changes mandated by this Commission. As stated in the *Second Further Notice*, a carrier's ability to cope with unforeseen events, yet remain competitive, is in part a function of its engineering, investment and operational decisions.[214] Accordingly, for the same reasons that the Commission denied AT&T's request for exogenous treatment of such costs, *i.e.*, to avoid creating the wrong incentives by reducing the carrier's need to be efficient

and innovative, we must also deny the LECs an automatic flow-through of all extraordinary costs. We reiterate that in the course of regulating rates over the years, we have consciously introduced mechanisms that could dampen carriers' incentives to be efficient or innovative only when we have concluded that there were countervailing public policies or interests. However, we find no such countervailing policies here that would weigh in favor of treating all extraordinary costs as exogenous.

190. Moreover, as we noted when we denied AT&T's request, if we were to allow exogenous treatment of extraordinary costs, we would be setting the stage for an endless succession of arguments focused on whether a particular cost qualifies as "extraordinary."[215] Nevertheless, consistent with the Constitutional ban on confiscatory rates, we leave open the possibility that, in a truly extraordinary situation, we would approve above-cap rates, even perhaps without suspension and investigation.

B. Application of PCI to LEC services

1. Service exclusions

191. In the *Further Notice* [216] and *Second Further Notice*,[217] the Commission proposed to exclude certain LEC services from price cap regulation. Some offerings that currently appear in the LECs' federal tariffs do not lend themselves to incentive-based regulation, or raise significant and controversial issues that should be resolved outside of the price cap arena. In this section, we discuss the LEC offerings that are excluded from price cap regulation and their regulatory treatment.

192. Previous Notices in this proceeding have named two LEC services that should be excluded from price cap regulation – individual case basis (ICB) offerings and special construction. No parties objected to exclusion of these offerings from price cap regulation. Our review of the LECs' federal tariffs reveals other types of offerings that we will exclude from price cap regulation. We will discuss each of these in turn.

193. ICB offerings are those offered on a contract-type basis. While ICB offerings appear in LEC tariffs, they are not tariffed as generally-available, common carrier services. In some cases, ICB services feature new technology for which little demand exists. As demand for the service grows, the ICB offering can evolve into a generally-available offering, as has been the case with large, digital, fiber optic transmission facilities. [218] In other applications, ICB offerings are simply unique service arrangements to meet the needs of specific customers[219] that will never evolve into generally-available offerings. Since ICBs are, by definition, offered on a contract-type basis, we believe that there is no reason to apply an incentive-based regulatory plan, intended and designed for generally-available tariffs, to these offerings. For those ICB offerings that become generally tariffed, we affirm the tentative conclusion of the *Second Further Notice* that the offering should be treated as a new service.[220]

194. We will also exclude special construction from price cap regulation. Special construction offerings can be ICB-type special arrangements, or one-time non-recurring charges for construction activity on a customer's premises. In either case, a price cap mechanism to govern prices for these offerings appears to be irrelevant.

195. We exclude certain other offerings that appear in the tariffs as well. Presubscription charges that LECs assess when an end user decides to change presubscribed interexchange carriers are excluded.[221] These charges are very different from the broader system of interstate access offerings that have been studied at length to determine LEC productivity. Like subscriber line charges, they represent a direct charge to end users. We will therefore exclude them from price cap regulation. Cable television services are typically offered on a contract - type basis, and will also be excluded from price cap regulation. Air-ground service and packet-switched service were not subject to scrutiny as part of our investigation of LEC productivity, and should therefore be excluded.[222] We also exclude "string" foreign exchange serving arrangements, currently grandfathered in existing tariffs. These arrangments enable end users who would otherwise be unable to obtain local service from the carrier in their assigned serving area to obtain local service from a LEC in an adjacent area through use of a foreign exchange line. These arrangements are generally found in rural areas where a subscriber's community of interest is located in a different LEC study area.[223]

196. In addition to the exclusions previously named, we will also exclude certain LEC offerings to the Federal Government, including those that LECs provide in combination with interexchange carriers. These offerings are contract-type offerings that are based on the results of competitive bidding, and do not lend themselves to price cap regulation.[224]

197. The services we exclude from price cap regulation represent a very small fraction of the LECs' federally-tariffed activities. In response to concerns about our ability to monitor these offerings apart from price cap services, we believe LECs should report non-price cap revenues on an aggregated basis. This requirement, together with our tariff review and complaint processes, will help us monitor excluded services activities.[225] We delegate to the Common Carrier Bureau the authority to make the necessary amendments to existing reporting mechanisms to carry out our directive.[226] We will not expand ARMIS reporting to include non-price capped costs, as previously proposed.[227] As commenters argue, such a change would require us to expand the cost allocation processes this proceeding seeks to avoid.[228] Given the relatively small amount of non-price capped activities excluded from price cap regulation, we believe that to impose such a requirement at this time would be unduly burdensome.

2. Baskets and bands

198. Baskets and bands are methods of restricting the degree of pricing flexibility that carriers would otherwise have if we adopted a theoretically pure price cap system. In a pure price cap system, all services offered by a carrier would be subject to a single price cap, and carriers would have unlimited ability to migrate individual prices up or down so long as aggregate prices remained below the cap. While a pure price cap system may appear attractive based on its potential for economic efficiency gains,[229] there are competing policy concerns that must be addressed in designing a system of price cap regulation for LECs. As proposed in the *Second Further Notice*, we will employ a system of baskets and bands to limit, but not eliminate, LEC pricing flexibility.[230] Our goal is to permit incremental changes in prices that will assist LECs in

achieving the efficiency objectives lying at the heart of this proceeding, without subjecting ratepayers to precipitous changes in the prices for LEC services, and without enabling LECs to disadvantage one class of ratepayers to the benefit of another class.

199. The baskets and bands, together with the price cap we described, *supra*, create a "no suspension" zone within which LECs may move prices on short notice, and with a presumption of lawfulness. If rates depart from that narrowly defined zone, however, LECs will face a more challenging tariff review process.[231]

a. Summary

200. Baskets are broad groupings of LEC services, each subject to its own price cap.[232] Subdividing LEC services into baskets substantially curbs a carrier's pricing flexibility, as well as its ability to engage in unlawful cost shifting between the broad groups of services. Whenever a set of rates is subject to a price ceiling, carriers have no incentive to shift costs into the basket because the cap does not move in response to endogenous cost changes.

201. To further limit LEC pricing flexibility under our price cap plan, we will modify the Commission's prior proposal to create three baskets of services, and instead create four baskets: (1) common line services; (2) traffic sensitive services; (3) special access services; and (4) interexchange services, for those carriers that offer such services. These baskets track the current Part 69 categories of interstate access services, and separate interexchange service into its own basket for those carriers that offer interexchange service. Separation of special access and interexchange services into separate baskets addresses the concerns of commenters that a combined basket would be difficult to administer, given the very different nature of these services and the exogenous costs that would apply to them.

202. As proposed in the *Second Further Notice*, we will further limit LECs' pricing flexibility through the use of pricing bands in two of the baskets we have established -- traffic sensitive and special access. These baskets are composed of several different types of interstate access service. By limiting the changes in the various types of interstate access, we can ensure that customers and competitors are protected against rapid and substantial changes in the price of access.

203. We have decided that pricing bands should apply to service categories within the traffic sensitive and special access baskets.[233] Service categories are simply subdivisions of baskets.[234] In the traffic sensitive basket, we create three service categories that track existing rate elements prescribed for all LECs in our Part 69 rules: (1) local switching; (2) local transport; and (3) information. In the special access basket, we have modified our proposed service categories to take into account trends in demand for special access services, or in some cases the use of like technology. Instead of the nine service categories proposed for special access services, we will require four: (1) voice grade/WATS/metallic/telegraph; (2) audio/video; (3) high capacity/Digital Data Service; and (4) wideband data/wideband analog.[235] By grouping similar services together, our revised plan continues to act as a substantial bar on a LEC's ability to engage in anticompetitive practices.

204. We adhere to the proposal in the *Second Further Notice* to allow prices for the service categories to move on a streamlined basis by plus or minus 5 percent per year, adjusted for changes in the price cap index.[236] Price changes that raise the aggregate prices in a service category above or below the 5 percent limits must be justified with reference to various cost based showings that we describe in the tariff standards section, *infra*. We elect to retain the 5 percent boundaries of the "no suspension" zone based on our judgment that LECs require some ability to change prices due to changing market circumstances.

205. We will not impose service category banding requirements in either the common line basket or the interexchange basket. No party has challenged our analysis from the *Second Further Notice* that all but one rate element in the common line basket -- terminating carrier common line charges -- must be priced according to this Commission's rules. Given the LECs' lack of flexibility to offset an increase in this one rate element with a decrease in another rate element, there is no need to impose service category bands in the common line basket.[237] Furthermore, the cap mechanism we impose on the common line basket causes the rate for terminating carrier common line charges to move in accordance with the cap.

206. In the interexchange basket, we also decide not to impose service category banding requirements, but for slightly different reasons. Interexchange services provided by LECs are limited. In the case of the former Bell System companies as well as GTOC, one possible interexchange offering is "corridor" traffic in large metropolitan areas, offered as an exception to consent decree prohibitions on interexchange services. LECs also provide interstate intraLATA service that is federally regulated. Other interexchange services offered by LECs, such as MTS and WATS-like services, are usually offered through a separate corporate entity, and would not be regulated under the price cap system we adopt in this Order.[238] We therefore find that the small amount of interexchange service subject to price cap regulation does not warrant the imposition of additional service categories.

207. Our decision to separate out interexchange service from the special access basket also leads us to another modification from the proposal advanced in the *Second Further Notice*. Because our evaluation of LEC productivity is based in part on the staff's short term study which includes only interstate access activities, application of a higher productivity number to interexchange activities of the LECs is not supported by the record. We believe that application of the AT&T price cap productivity of 3 percent, is a more accurate and equitable measure of the productivity we can expect LECs to achieve in that part of their business that competes with AT&T's services.[239] We therefore apply a 3 percent productivity offset to the fourth, interexchange basket.

208. In addition to creating 5 percent pricing bands on the service categories in the special access basket, we will also adopt special protections for DS1 and DS3 services that have recently been the subject of extensive and controversial Commission proceedings.[240] Due to concerns that LECs have engaged in non-cost-based "strategic" pricing of these services under rate of return, we are limiting movements in the prices of these individual services through the use of service-specific pricing bands, or "subindexes."[241] Under the rule, prices for DS1 service may move only plus or minus 5 percent per year adjusted

for the price cap index to remain within the "no suspension" zone. Prices for DS3 service may move only the same amount. Our decision to permit incremental movements in pricing for these services recognizes that price cap regulation is a departure from rate of return regulation and its fully distributed costing methods that have defined "strategic" pricing. At the same time, we are also interested in protecting ratepayers and competitive providers of these particular services by limiting, but not eliminating, pricing flexibility.

b. Baskets

209. As discussed with respect to AT&T, we believe it is important to minimize the number of baskets, and therefore, the number of price cap indexes, that apply to LEC services. A number of commenters argue that additional baskets are required to protect them from the anticompetitive pricing actions that they allege will occur if only three baskets are established.[242] Several LEC commenters, however, argue for use of a single basket.[243]

210. We agree with neither group. We believe that each of these positions places undue weight on different, but competing, policy considerations at issue. While it is important to ensure that LECs cannot, for example, exercise their pricing flexibility under price caps to disadvantage switched access customers while benefitting special access customers with low rates, it is also important to ensure that the price cap system we design is internally consistent. The productivity offset we have defined was selected on the basis of total company performance, not the performance of individual "baskets" of services or on a service-specific basis. Each time we create an additional basket of services we increase the risk that for that basket, the company will not be able to achieve the productivity challenge embedded in the price cap index.[244] We therefore believe our desire to protect groups of ratepayers must be tempered by our decision to use a company-average productivity offset in each of several baskets. Furthermore, since we are adopting other means to protect ratepayers, *i.e.*, service categories, bands, and subindexes, there is no necessity to create numerous baskets that would duplicate these efforts.[245]

211. Our decision to create four baskets of services represents a balance of these competing considerations. Three of the baskets, common line, traffic sensitive, and special, reflect broad categories of LEC interstate access service defined and prescribed by our existing Part 69 rules. Interexchange services, too, have also previously been recognized as a separate category in our rules.

212. With respect to the common line basket, additional reasons exist for separating it from the other access services LECs provide. Common line services support a number of programs that promote low-cost telephone service in rural or high cost areas of the Nation. These universal service programs are important to preserve under a price cap system of regulation.[246] As the *Second Further Notice* states, by separating common line in its own basket, we can ensure that these universal service programs are unaffected by the implementation of price cap regulation.[247]

213. With respect to the interexchange basket, we believe separate treatment of interexchange services is necessary to ensure orderly application of imputed access flow throughs.[248] As United argues, the proposal contained in the *Second Further Notice* to make interexchange services part of the "all other" basket, while creating a separate service category for it, created difficult problems with respect to a exogenous cost treatment of access charge changes imputed to a LEC's own interexchange services.[249] Application of the full amount of an access charge decrease to a single service, for example, could easily cause a LEC to breach the lower band for the interexchange service category, even after the price cap index was adjusted to reflect the access charge change. Furthermore, interexchange offerings are fundamentally different from the special access services. Placing two very different services, with different sets of customers, in the same basket is a result we have attempted to avoid due to the cross subsidy issues that might arise. While some LECs argue that any increase in the number of baskets is not needed,[250] we find that the potential for cross subsidization warrants the addition of a fourth basket.

214. In response to the concerns expressed by several parties, we specify the services to be included in the interexchange basket.[251] "Corridor" offerings (interstate interLATA),[252] international offerings, and any other interexchange offering a carrier may provide will be included in the interexchange basket to the extent a LEC offers them. We disagree with those commenters seeking individual baskets for these services. As previously discussed, application of a productivity offset embedded in the price cap formula to individual services raises serious concerns since the offsets have been formulated on the basis of total company performance.[253]

215. The addition of an interexchange basket also responds to concerns raised by Hawaii about the application of price cap regulation to GTE Hawaiian's International Message Telecommunications Service (IMTS) rates.[254] GTE Hawaiian's IMTS rates will be part of the interexchange basket for the GTOC companies. We believe that placing this service in the interexchange basket will curtail the possibility that GTE Hawaiian can use its IMTS rates to engage in anticompetitive practices. Furthermore, both Hawaii and GTOC agree that GTE Hawaiian's IMTS offering be placed in a separate basket.[255]

c. Service categories

216. As in the case of baskets, we have used existing interstate access tariff offerings as our guide in selecting service categories subject to banding. The traffic sensitive basket consists of three categories of service that are defined as Part 69 rate elements within the traffic sensitive category. We have elected not to adopt the suggestions of a few commenters that we create a fourth category for equal access rates.[256] Under rate of return, equal access is an optional "subelement" of local switching that carriers may elect to use in recovering the costs of equal access. Particularly for the largest eight carriers, and generally for the other Tier 1 carriers that may elect price cap regulation, the equal access element represents a charge that will be phased out as the carriers finish recovering the costs of converting to equal access. For many of these carriers, the conversion process is substantially complete. We therefore decline to create an additional service category for the optional equal access element.[257]

217. In addition to the issue of the equal access element, parties raise other concerns about the service categories in the traffic sensitive basket. Some parties argue for the creation of an 800 database service category.[258] Others argue for consolidation of the categories as proposed.[259] We agree with neither group. Our decision to employ the three service categories proposed is

fashioned after our treatment of these categories under current regulation. While rate movements of subelements are scrutinized, our general focus in the tariff review process is on the traffic sensitive elements contained in Part 69. Similarly, under price caps, substantial subelement price movements that cause a traffic sensitive element to breach its banding limitations will be given more extensive scrutiny. We therefore believe that ratepayers will be adequately protected by the three categories proposed in the *Second Further Notice* : local switching, local transport, and information.

218. A number of parties have responded to our request for comments on the basket and band treatment of future subelements that will be a function of implementing our Open Network Architecture policies.[260] As we discuss in the ONA section, *infra*, we believe these issues are best addressed in the context of our pending *ONA Part 69* proceeding.[261] Similarly, issues relating to other services that require fundamental changes in our Part 69 rules will be addressed in future proceedings as they arise.

219. In the special access basket, we have decided to reduce the number of service categories from the nine specified in our original proposal, to four. Our decision is based on further review of the special access services, their technology, customer base, and demand trends.[262] Several special access services that had been proposed for separate category treatment, for example, are declining services. Demand for "metallic" service, once required for alarm systems, is decreasing. Demand for "telegraph" service is similarly decreasing. Furthermore, the kinds of customer requirements that once could only be served by use of these specially-conditioned lines can now be provided by voice grade circuits. Given the interchangeability of these services, and the small amount of metallic and telegraph services that LECs provide, we have decided to merge these categories. To this group, we have also added WATS circuits, which are also voice-grade lines.

220. Similar analyses were made of the other categories. Audio and video services, which are different offerings of analog service, serve a similar customer base. As the cost of digital-based technologies falls, both types of services will eventually migrate to digital offerings. Wideband data and wideband analog, both analog services, pre-date the arrival of digital technologies and will eventually be subject to migration to digital. High capacity offerings and Digital Data Service serve the needs of customers requiring high capacity digital transmission mediums.

221. By placing services with somewhat similar customer bases, demand characteristics, and technology into a single category, we believe we have struck a better balance between the ratepayer protections we seek in this plan and the limited pricing flexibility we seek to create.[263] A number of parties oppose the consolidation of service categories in the special access basket. Some fear that prices for special access services will be "manipulated" to their disadvantage.[264] Some argue that the categories we create will yield anticompetitive abuses.[265] We find these arguments to be unpersuasive. Under rate of return, there are no Part 69 cost allocations for special access services. The price cap categories, together with the 5 percent pricing bands we establish, represent a substantial advance in our ability to slow rate changes and make their magnitude more predictable. Furthermore, the tariff showings we establish for above-band and below-band filings require LECs to justify large rate changes. Of course, to the extent commenters argue in favor of traditional rate of return review of special access rate changes,[266] their quarrel is fundamentally with price cap regulation.

222. Several parties have renewed their request for rate element banding.[267] Instead of applying the pricing bands to service categories, these parties would apply them to individual rate elements that comprise the services. We believe this requirement is unnecessarily burdensome. There are thousands of rate elements, particularly in special access, that would need to be separately banded if we adopted rate element banding. Each time a carrier filed a tariff transmittal, the rate elements affected by the transmittal would have to be accompanied by index information necessary to ensure compliance with the bands. In the case of the annual filing, this would have to be done for approximately 11,000 rate elements. Furthermore, no party has demonstrated that service category banding, in combination with the tariff requirements associated with the no-suspension zone, will cause prices that the average customer pays for service to be unreasonable. The operation of the cap, in conjunction with the operation of the sharing device, protects ratepayers. To the extent parties seeking rate element banding seek to impose strict controls on changes in LEC access rates, that is a guarantee not currently available to them under rate of return regulation, since carriers are always free to submit new rates based on revised costs. Moreover, this result is inconsistent with one of the objectives of price caps -- reducing administrative burdens.

223. Treatment of DS1 and DS3 rates presents special problems. DS1 rates have recently been subject to a lengthy investigation and are currently subject to pricing requirements that establish a relationship between DS1 and voice grade lines. DS3 rates are currently under investigation for similar issues. In recognition of the concerns advanced by commenters that price cap regulation would give to the LECs the ability to undo current pricing relationships,[268] we have decided to limit, but not eliminate, pricing flexibility for each of these services. Under the plan we adopt, DS1 and DS3 rates can each move plus or minus 5 percent adjusted for changes in the price cap index. We therefore prospectively replace the cross-over relationships we used as a guideline for DS1 rates under rate of return regulation.[269]

d. Pricing bands

224. The proposal to set the upper pricing band at 5 percent drew comment from those who believe the amount is acceptable,[270] as well as those who believe it is overly generous.[271] We believe the 5 percent band is a reasonable amount of upward pricing flexiblity to associate with the no suspension zone. A 5 percent upper band ensures LECs have some ability to adjust prices to changing market conditions, at the same time protecting ratepayers from substantial changes in service rates. The upper band is also consistent with our decision to move forward with a price cap system that looks, in the first instance, to LEC prices, instead of relying on fully distributed costs.

225. We also disagree with commenters who would set the upper band at some level below 5 percent upward flexibility, or at zero.[272] These positions are nothing more than an attempt to freeze relative LEC rates at or close to current levels. Earlier discussions in this proceeding have described the shortcomings of imposing rate freezes on carriers,[273] and we have specifically rejected an AT&T

proposal to engage in a rate freeze for LECs. We also reject proposals to limit upper bands to some amount between 0 and 5 percent. Commenters who argue against 5 percent upper bands apparently construe an upper band as a Commission directive to increase rates to the maximum level allowed.[274] The 5 percent limit represents nothing more than a reasonable estimation, based on our post-divestiture experience and our expectations for the future, that rates within the annual limit can be presumed lawful for tariff review purposes.[275] Accordingly, we reject these more narrow upper pricing bands.[276]

226. With respect to the lower bands, which we also set at 5 percent, commenters have argued that we should substantially expand the lower boundary of our no suspension zone or eliminate the lower boundary entirely.[277] We disagree. The lower pricing bands are intended as a check on the ability of LECs to engage in predatory pricing. Whenever a LEC pierces a lower band, we require a cost showing to demonstrate that the rate is above the carrier's average variable cost. While LECs are for the most part monopoly providers of access service, they are increasingly subject to competitive pressures from facilities-based alternative access providers. The lower bands also limit the LECs' ability to decrease the price for one service in order to raise the price of another.[278] Without a lower band, a substantial decrease in the price for one service could offset increases elsewhere in the basket that might otherwise not occur.[279]

3. Comparing actual prices to the Price Cap Index (PCI)

227. Price cap regulation requires that, in order to be subject to streamlined tariff review, a carrier's actual prices may not exceed its PCIs. As the Commission described in the *Further Notice*, this is to ensure that a carrier's average prices move in accordance with its underlying cost factors.[280] To ascertain compliance with the PCI, carrier rate levels within each basket will be measured through the use of an Actual Price Index (API) that represents the weighted sum of the percentage change in LEC prices.[281] The API is built up from the smallest price unit -- the rate element --weighted according to the quantity of that rate element sold in a historical base year. As in the case of AT&T price caps, the historical base year will be the most recently completed calendar year as of the time of the annual filing. Each time a carrier files rate revisions, the API will be employed to measure the incremental change in the aggregate price of each basket of LEC services.

228. As discussed in the previous section, we will limit the LECs' ability to adjust individual prices substantially, even though average prices might remain below the PCI. Pricing bands are designed to limit the range within which a carrier could raise or lower individual prices of service categories each year while continuing to receive streamlined tariff review. In order to implement service bands, we direct the LECs to establish subindexes, within each basket, that measure the movement in the revenue-weighted aggregate price of the group of rate elements that comprise the banded service category. Each such service band index (SBI) will be calculated using the same formula we are adopting for the API. Indeed, an SBI is nothing more than an API limited to the weighted price ratios for a particular service category. Thus, the weighted sum of all SBIs equals the API. Like PCI, the APIs and SBIs will be initiated at a level of 100.[282]

229. The API and SBI formulas we adopt are identical to the API and SBI formulas currently used in the AT&T price cap plan. In connection with the PCI, the formulas will provide a "point-in-time" or snapshot view of where LEC prices are relative to the cap. The overall rates proposed by the carriers will be deemed in compliance with the price cap only if the API is less than or equal to the PCI at all times. Both the API and PCI will change over time as actual prices of capped services change and as the underlying cost factors, reflected in our formulas, change.

4. Use of existing rates

230. We conclude that LEC interstate access rates, as they existed on July 1, 1990 and were adjusted by an Erratum,[283] are the most reasonable basis from which to launch a system of price cap regulation. We further find that adjustment of various indexes to reflect the change in the authorized rate of return that we adopt today in a companion item,[284] and the completion of any investigations that result in rate changes, will ensure that rates remain reasonable for the limited purpose of creating a starting point for the indexing of rates under a price cap system. Our confidence in July 1, 1990 rates as a starting point for price cap regulation flows from a lengthy, six-year history of regulatory reform to refine our administration of rate of return regulation. Based on those reforms, for example, the Common Carrier Bureau's recent examination of LEC annual access filings concluded with a rate decrease of approximately $1 billion.[285] For the reasons discussed below, we find that July 1, 1990 rates adjusted as described are the best set of rates from which to initiate price cap indexing.

231. Selection of a particular date from which to commence indexing is necessary due to the nature of the indexes themselves. As we have previously discussed, both the price cap index and the actual price index will be initialized at a value of 100, consistent with the economic conventions normally applied to such indexes.[286] At issue is the selection of the date on which both the price cap index and the actual price index will be set at 100. In the case of AT&T, the Commission selected a date six months prior to the start of price caps. The selection of an historical date, as opposed to a prospective one, prevented AT&T from engaging in any aggregate price increases in the period leading up to price caps. We decide to do the same for the LECs. We explain in the next section why rates in effect on July 1, 1990 are a reasonable starting point for price cap regulation.

a. Reasonableness of July 1, 1990 rates

232. In order for July 1, 1990 rates to fulfill the role we assign to them, we believe it is necessary that they reflect the reasonable operation of rate of return regulation. We find that they do. The July 1, 1990 rates resulting from the annual 1990 access proceeding represent the culmination of years of developing, refining, and overseeing the Commission's access charge system. The rates resulting from this process, while perhaps not perfect, in general represent the best that rate of return regulation can produce. To the extent that any ongoing investigations of current rates reveal that the July 1, 1990 rates are deficient, mechanisms within the price cap regulatory system will ensure that the deficiencies are remedied.

233. Our conclusion that July 1, 1990 rates are in general the best that rate of return regulation can produce is the result of this Commission's six year long effort at reforming our rate of return methods. Beginning in 1983 with the introduction of a prescribed system of interstate access offerings, the Commission has substantially overhauled its rate of return machinery.[287] The Commission has revised its Uniform System of Accounts (USOA) that forms the basis of our ability to track costs.[288] The Commission has instituted cost allocation procedures to separate nonregulated costs from the combined regulated and nonregulated costs recorded in USOA accounts.[289] Even the process for selecting a reasonable interstate rate of return has been revised.[290] Most importantly, the accounting and allocations resulting from our USOA requirements, the separation of nonregulated costs, the separation of the regulated remainder into inter-and intrastate cost pools, and the tracking of those costs through to the resulting interstate access components, must be reported to this Commission on a regular basis to ensure that our requirements are followed.[291]

234. The tariff process, too, has grown increasingly sophisticated. For example, the Common Carrier Bureau each year establishes Tariff Review Plan requirements for summary cost support material the LECs must file to justify their annual access charge revisions. The specific format required by the Tariff Review Plan ensures that the Common Carrier Bureau has usable and reliable cost support data at its disposal. Summary data in support of proposed general access charge revisions were first required for the 1985 annual access tariff filings.[292] In each subsequent year, the Common Carrier Bureau modified the Tariff Review Plan based on its continuing experience in analyzing the LECs' interstate access tariffs, evaluating the usefulness of the previous Tariff Review Plan data, and recognizing ongoing rule changes. By carefully laying the ground work for standardized cost support, the Common Carrier Bureau has been able to identify and disallow over $2.7 billion in LEC access charges since 1985.

235. In the annual 1990 access filing, for example, the LECs submitted tariffs which would have reduced interstate access charges by a total of approximately $405 million. The Common Carrier Bureau determined, however, that these rates contained erroneous projections of expenses, investments, and demand that would have produced excessive rates. After examining the extensive record developed in the course of the tariff review process, the Bureau adjusted the LECs' rates downward by an additional $696 million.[293] Such annual review assures that rates developed under rate of regulation are reasonable.

236. Examination of LEC access rates, however, has not been limited to annual access filings. Under our access charge rules, LECs are required to target their access rates to the authorized rate of return. In 1988, the Commission shifted the annual access tariff filings from a January-December to a July-June access year and established two 15-month transitional access periods -- January 1988 to March 1989, and April 1989 to June 1990.[294] The Commission recognized that the use of 15-month access periods increased the risk that rates would not comply with the rate of return target. The Commission therefore directed the Common Carrier Bureau to make adjustments to the rates of those LECs that did not voluntarily file midcourse corrections to their rates upon the accumulation of actual data which demonstrated excessive returns. The Bureau directed LECs with excessive earnings to reduce their rates or to show cause why their rates should not be reduced.[295] LEC rates have been significantly reduced as a result of this process.

237. Since initiation of the access charge system, the Commission has paid particularly close attention to the LECs' special access rates. Recognizing the diversity of LEC special access offerings, the Commission decided not to prescribe a system of offerings for special access, as it did for switched access.[296] In accordance with the requirements of the Communications Act, however, the Commission sought to eliminate the unreasonable discrimination inherent in the then-prevailing system of local private line provisioning, and to replace it with a single, uniform, nondiscriminatory rate structure. When special access rates were first introduced, the LECs made several unsatisfactory attempts to develop a just and reasonable special access rate structure. The Commission found that the first few attempts by the LECs to design special access tariffs resulted for a number of reasons in filings that violated the Communications Act.[297]

238. While the LECs ultimately filed special access tariffs that in general provided a uniform, nondiscriminatory rate structure,[298] in May 1985, the Bureau initiated an investigation in CC Docket No. 85-166 to examine certain rate structure, cost support, and rate level issues raised by the LECs' special access tariffs.[299] The Bureau noted in particular that some LECs had adjusted their rates for high capacity and digital data services upward to a level designed not only to recover access costs but also to achieve strategic marketplace objectives, such as discouraging bypass of switched access services or influencing the mix of special access services and facilities used by LEC customers, an observation LECs later admitted was accurate.[300]

239. During the period that these rates were under investigation, some tariff filings were suspended, some were rejected, while others were made subject to the ongoing investigation.[301] By 1989, subsequent to the release of the *Strategic Pricing Order*, rates for high capacity "DS1" service and voice grade service were within the 4-to-1 and 8-to-1 cross-over range the Commission had established as one indicator of reasonableness.[302] This Commission has recently concluded that there is no further justification for the strategic pricing of DS1 and voice grade special access services.[303] We reasoned that

> [t]he uncertainty and dislocation caused by the AT&T divestiture and the implementation of the new access charge regime are now problems of the past . . . . the experience that the LECs have gained in dealing with the introduction of new services should leave them better prepared to respond to rapid increases in demand for future new services. The LECs must now look to their own business planning to deal with marketplace changes.[304]

With regard to the LECs' rates that were in effect from April 1985 to March 1989, we found that certain LECs had violated our strategic pricing policy. We therefore directed these LECs to refund the amounts over-earned.[305]

240. In the *1989 Access Order* the Bureau rejected two DS1 rates that were not within the crossover range and were not justified.[306] Those companies refiled DS1 rates within the range. The Bureau's examination of the LECs'

1990 special access rates also revealed that one carrier had filed a DS1 rate outside the crossover range. Accordingly, the Bureau suspended those rates for the full five-month statutory period and initiated an investigation.[307] Thus the tariff review process has served to assure that the rates in effect July 1, 1990 are reasonable.

241. Commenters have also argued that all outstanding rate investigations must be resolved prior to inaugurating price cap regulation.[308] We disagree. During the past 12 months, the Commission has resolved approximately 19 tariff investigations concerning a variety of issues. Approximately 8 remain pending. The majority of other outstanding items stem from various LEC appeals of our disallowance orders. Since we are not making a finding that existing rates are just and reasonable, but only that they are a reasonable starting point for price caps, resolution of these proceedings is not necessary before inaugurating price cap regulation. Should we find, at the conclusion of one of these pending matters or of a complaint, that a rate was or is unlawful we will order refunds and/or make adjustments to the price cap indexes, actual price indexes, service band indexes, or all of the above, as required.[309] We therefore reject the arguments of some commenters that we must conclude all outstanding investigations before launching price cap regulation. Use of July 1, 1990 rates does not "lock in" any unlawful pricing practices, should they exist, as some commenters suggest.[310] Corrections can and will be made to relevant indices to reflect any determination that a July 1, 1990 rate was unlawful, whether made in a Section 204 tariff investigation or Section 208 complaint proceeding, even if that proceeding is instituted after adoption of this Order.

242. We also disagree with those commenters that argue that rate of return regulation, due to its inherent inefficiencies, has produced rates that are inflated, and that these rates must be "deflated" by resort to a rate case before price caps can take effect.[311] While we agree that rates produced by a rate of return system can be uneconomically high, it is the ongoing operation of price cap regulation that will produce lower rates, not a pre-price cap rate case. As previously explained in our discussion of the productivity offset, price cap regulation forces carriers to be more productive than they were under rate of return regulation and encourages rate reductions. By forcing prices down in real terms, the price cap index ensures that any inefficiencies embodied in current rate of return rates are eliminated over time, as the LECs are able to improve their productivity.

243. Moreover, it is not clear to us how a rate case, conducted using rate of return principles, could do anything more than derive rates that continue to reflect rate of return and its requirements of fully distributed costing. There is no guarantee that a full general rate case would result in rates that are substantially different from (*i.e.*, lower than) those currently in effect. Given the limited potential utility of such a proceeding and our view that price cap regulation offers ratepayers and carriers significant benefits, we do not believe that the indefinite delays that could result from conducting rate cases for each LEC can be justified. A delay in the implementation of the price cap system means a delay in the introduction of more economically efficient rates. Such a delay is particularly unwarranted given our ability to make adjustments to price cap mechanisms that give full effect to any finding of unlawfulness in specific investigations that are underway.

244. We also reject arguments that a truncated rate case could be undertaken prior to inaugurating price caps and without delaying the benefits that price cap regulation brings. No party has suggested a workable method for a truncated rate case. Commenters suggesting that cost data already filed permits an equitable calculation of "embedded inefficiencies" have not revealed a method for identifying and quantifying such inefficiencies caused by rate of return.[312] Again, we note that adjustments will be made to reflect any subsequent determinations in a tariff investigation or complaint proceeding that an existing rate is unlawful.

b. Adjustments to July 1, 1990 rates

245. During the period between the July 1, 1990 date from which indexes begin and the January 1, 1991 start date of price cap regulation, LECs remain free to introduce new effective prices justified under existing rate of return cost support requirements. LECs may also restructure or change special access services, consistent with current Part 69 limitations and the requirements of the Communications Act. To the extent LEC transmittals have the effect of increasing prices for services during this six month period, our decision to inaugurate the price cap index (PCI) on July 1, 1990 and to require actual prices to be equal to or below the PCI on January 1, 1991, prevents LECs subject to price caps from engaging in a rapid escalation in prices that would have the effect of raising their price cap base rates. Since the elements of the PCI are outside the control of the carriers, and do not depend on actual prices, the price cap that LECs must adhere to on January 1, 1991 will not increase should a LEC attempt to raise prices in the interim.

246. Moreover, based on decisions made in this Order and in the companion rate of return item, the January 1, 1991 PCI will be less than the July 1, 1990 PCI that we set at a value of 100. There are several reasons why this drop in the PCI will occur. First, as we discuss in Appendix F, the first price cap filing will merely translate existing LEC rates into price cap terms in the middle of a tariff year. Annual price cap filings are scheduled to become effective on July 1 of each year, and the inflation-less-productivity component of the PCI formula is included only at the time of the annual filing.

247. In the *Supplemental Notice*, we proposed that the rate of return represcription be treated as an exogenous cost decrease for price cap carriers,[313] and we now confirm that proposal. Because the decrease in the allowed rate of return must be removed from the rates of LECs subject to price caps before allowing price caps to become effective, we will treat the rate of return represcription as an exogenous cost adjustment. In the companion item we adopt today, the rate of return represcription is scheduled to become effective January 1, 1991. Unless the represcription is treated as exogenous, LECs entering price cap regulation will be able to use the higher, pre-represcription rates as a base for their price cap rates. In order to ensure that the timing of our rate of return represcription does not disadvantage ratepayers of those LECs entering price cap regulation, we will treat the represcription as an exogenous cost decrease to PCI levels, thereby ensuring that price cap rates decrease.

248. Given our recent rate of return review of LEC access rates that resulted in a rate decrease of approximately $1 billion, and our decision to treat the represcription as exogenous, we do not agree with the

suggestions of commenters that we need to retarget rates for the various access services to the authorized return prior to launching price caps.[314] The retargeting process was part and parcel of our decision on July 1, 1990 access rates, and our represcription decision today further ensures the reasonableness of existing rates as a starting point for price caps.

249. We also see no need to require a *pro rata* adjustment of rates to the rate element level to implement the lower authorized rate of return for price cap carriers. Rate elements number in the thousands, and many per-minute charges are quite small. A *pro rata* decrease by element would be cumbersome and unnecessary. However, we do not believe that in adjusting rates to account for the represcription, LECs should have the full amount of pricing flexibility they will be allowed under price cap regulation. The rates currently in place are targetted to earn at or near the current prescribed rate of return. Because these rates are based on long experience and were recently revised to the earnings target and reviewed, it is reasonable to accept them as adequately targetted. Because the effect of the rate of return represcription is simply to reduce the return component of these rates, an equally simple across the board rate reduction should also be a reasonable means of implementing this necessary prelude to price caps. It is also necessary and reasonable for LECs who will remain under rate of return regulation. We therefore will expect LECs, in making adjustments to rates to fulfill the represcription requirements, to file service rates that, on a percentage basis, are approximately equal. Departures from this practice, or rate element changes that work hardships on particular customers, will need to be justified by a demonstration that the deviation is necessary to retarget rates to the newly prescribed rate of return.

250. Another possible cause for rate reductions on January 1, 1991 is that some investigations may be completed during the six months leading up to price cap regulation. To the extent that an order terminating an investigation directs a LEC to reduce its existing rates, that adjustment must be treated as an exogenous factor to the PCI to ensure that price cap rates are as reasonable as possible.[315] One or more of the LEC's price cap indexes for the basket containing the service subject to investigation will be adjusted to ensure that rates are reasonable.[316]

c. Upfront rate cuts

251. We agree with those LECs that argue that the represcription process should not be used as a vehicle for generating an upfront rate cut for price cap carriers. We believe that the represcription proceeding detailed in the companion item is properly decided on its own merits. However, having made the decision to reduce the authorized return in that item, we believe that price cap carriers should be subject to its cost of capital findings.

252. In view of our decision to require service rates to be retargeted to reflect the represcription of the cost of capital, and our recent examination of LEC access rates in the July 1, 1990 filing, we do not believe a separate upfront rate cut is warranted. Arguments in favor of such a cut tend to rest on the supposition that the inefficiencies attendant to rate of return regulation must be recaptured for ratepayers upfront, before the productivity-enhancing incentives we have created have a chance to operate.[317] We cannot agree. Upfront cuts should be limited to ensuring the prices going in to price cap regulation reasonably reflect an adequate rate of return system.

253. As the LECs note, our authority to prescribe rate reductions under Section 205(a) depends upon a finding that current rates are or will be unreasonable. The commenters provide no evidence that existing rates for LECs covered by price cap regulation are generally unreasonable, and we are aware of no such evidence. We do expect that LECs can and will be more productive under a price cap incentive system, but this belief, however well-founded, does not furnish proof that any single LEC has unjust and unreasonable rates now. If customers have such proof, they of course remain free to present it in a complaint proceeding, and, if appropriate, adjustments will be made.

254. Even if we could conclude that we have the authority and the evidence to order upfront rate cuts, we do not believe such cuts are desirable or consistent with the price cap plan. Rate of return is not an unreasonable or unlawful form of regulation. We have merely concluded that another method will produce improved regulation. It would be inconsistent and inequitable to order retrospectively that LECs reduce their rates because the regulatory system was imperfect. The Consumer Productivity Dividend will ensure that downward pressure will be exerted on rates in real, inflation-adjusted terms to produce reasonable rates in the future. Moreover, to the extent that efficiency gains will be achieved under price caps, the backstop mechanisms we are establishing will assure that a fair share of the efficiency gains are used to lower customers' rates.

d. GTE Hawaiian IMTS rates

255. In addition to the general concerns about the use of existing LEC rates as a basis for price cap indexes, Hawaii has argued that GTOC's international MTS (IMTS) rates to and from Hawaii are excessive.[318] We do not find substantial reason to exclude these rates, which have been subject to challenge and review in the Section 204 process, from the price cap program. We believe that delaying the initiation of price caps in this regard is undesirable, since we expect that these rates will decrease under price caps. Further, we believe the recent entry and continuing presence of strong competitors such as AT&T, MCI, and US Sprint in the Hawaiian IMTS market makes it highly unlikely that GTOC could sustain excessive rates.[319] Moreover, the proliferation of fiber optic undersea cables in the Pacific Ocean region could attract other viable IMTS competitors.[320] Our decision to place IMTS in a separate, interexchange basket will also act to restrain GTOC's ability to set excessive rate levels. More importantly, if GTOC's IMTS is in the separate interexchange basket, IMTS cannot be either a source or a recipient of unlawful cross-subsidy from GTOC's interstate access rates. By placing IMTS in the separate interexchange basket, we will be able to monitor GTOC's pricing and provision of service very closely. We therefore conclude that GTOC's existing IMTS rates to and from Hawaii provide a suitable starting point for price caps.[321]

256. We are not insensitive to the view that IMTS rates, in general, are too high. It is our belief that high IMTS rate levels are for the most part attributable to an international accounting rate imbalance. We have been actively reviewing international accounting rate issues in order to prompt renegotiation of these rates.[322] Successful comple-

tion of these negotiations will benefit consumers in Hawaii and across the United States. Since this is an ongoing process that requires the participation of foreign administrations, we do not find it necessary or even desirable to exclude GTOC's IMTS from price caps until all international accounting rates have been reformed.

C. Eligibility

257. In this section, we discuss which LECs are subject to mandatory price cap regulation and which may elect price cap regulation. There are approximately 1400 LECs providing interstate access service, and enormous differences exist among them in the number and concentration of their access lines, the geographic location and dispersion of their affiliates, and the number of states they serve. Beyond these physical differences, LECs providing interstate access exhibit significant financial and operational differences in their assets, revenues, and earnings; the extent of their participation in NECA pools; and their use of average schedules. As previously discussed in the section on selection of a productivity offset and the need for backstop mechanisms, the vast differences among LECs caution against applying a single price cap plan to such a broad spectrum of companies.

258. Among these companies, however, there is a small group of eight very large firms that provide the great bulk of local exchange facilities and services. These are the seven Regional Bell Operating Companies (RBOCs) and the GTE Operating Company (GTOC). Together, these eight companies provide 88 percent of all local telephone lines in the U.S. (Each of the eight provides from 8.4 percent to 12.3 percent of the total number of lines.) Even the smallest of these eight, SWB, is several times larger than any of the other non-RBOC/GTOC local exchange carriers.[323] These few companies provide virtually all local exchange and access service in virtually all major metropolitan areas.

259. Whether and how the vast majority of ratepayers will benefit from price cap regulation depends largely on the participation of this group of companies in the program. Moreover, we believe the tentative conclusion that price cap regulation should be mandatory for these LECs is correct. Our calculation of the industry productivity offset is largely based on the historical experience of these companies. If these large LECs were permitted to choose the form of regulation they preferred, they might well manipulate the system in a way that would undercut the purposes and incentives of the program, and reduce the benefits to customers, who have no such choice. Significantly, mandatory participation by the eight largest LECs is endorsed by USTA, on behalf of all the LECs, including these eight carriers.

260. We have thus modified the scope of mandatory price cap regulation in one respect. The Commission had proposed to make price caps mandatory for all LECs with sustained regulated interstate revenues of at least $100 million, a group we have labeled for other purposes as Tier 1 carriers. On the review of the comments and evidence, it appears that the mid-size companies do differ significantly from the eight largest companies in the size and scope of their operations, and may differ in the productivity they can reasonably be expected to achieve. For this reason, we conclude that it is more appropriate to proceed cautiously and to group these companies with the smaller Tier 2 companies for the present and allow them to choose price cap regulation on a voluntary basis.

261. For these and other LECs for whom price caps is voluntary, withdrawal from the NECA pools is a prerequisite for eligibility. LECs that continue to participate in such pools, including so-called "average schedule" companies, will not be eligible to participate. However, a LEC holding company with both cost and "average schedule" affiliates that seeks to participate in price cap regulation, will be required to convert all cost affiliates to price cap regulation, but will not be required to convert its average schedule affiliates.[324] We also amend the prior proposal, which would have allowed only one election date, to provide a once-a-year opportunity for additional LECs to elect price cap regulation. Finally, where a merger or acquisition takes place between a price cap company and a non-price cap company, other than an average schedule company, the non-price cap company will be required to convert to price cap regulation within one year of the transaction.

1. Mandatory price cap regulation

262. In a departure from the *Second Further Notice*, which proposed mandatory participation for all depooled Tier 1 LECs and their cost affiliates, we have decided to limit mandatory participation to the seven RBOCs, GTOC, and their cost affiliates, as suggested by several parties. [325] Others support different approaches to mandatory regulation.[326] Some favor limiting mandatory regulation to the RBOCs and excluding GTOC.[327] However, based on a comparison of GTOC with the RBOCs, we cannot justify excluding GTOC from the mandatory scheme we apply today to the RBOCs. For our purposes in this proceeding, GTOC is far more like the RBOCs than unlike them – and more like the RBOCs than like the other Tier 1 LECs.[328] Our decision to limit mandatory price cap regulation to the eight largest holding companies and their cost affiliates brings under price cap regulation the vast majority of access lines and geographic area, and therefore extends the benefits of price cap regulation to a broad segment of the population.[329]

263. Though the rules we adopt today slightly reduce the extent of mandatory participation proposed in the *Second Further Notice*, we believe the advantages of this approach, combined with our intent to review regulation of smaller and mid-size LECs (and to collect further information on their productivity) outweigh the uncertainties and other disadvantages of making mid-size LECs subject to mandatory price cap regulation. Several considerations support this belief. First, as we noted earlier, the comments and supporting studies of mid-size Tier 1 LECs cast some doubt on their ability to meet the productivity standard we adopt today for the largest LEC holding companies and their affiliates. As the mid-size Tier 1 LECs and others note, we derive those standards from studies that focused on the pre-divestiture AT&T and from post-divestiture studies focusing on the eight largest LECs.[330] Second, we note the considerable diversity among the smaller Tier 1 LECs. For example, several of the mid-size companies, such as CBT and SNET, provide service to a concentrated geographic area, while others, such as Centel, operate on a more broad-based geographic area.

264. Third, the designation of a company as a Tier 1 carrier was initially made as a matter of administrative convenience at the time interstate access tariffs were first implemented.[331] At that time, we decided to require Tier 1 carriers to file more extensive, standardized information

in order to simplify the tariff review proces. Although the Commission has utilized the Tier 1 designation in other areas to establish different disclosure requirements, status as a Tier 1 carrier should not be determinative of participation in price cap regulation.

265. While we are concerned that, in theory, LECs for whom price cap regulation is optional might avoid price cap efficiency incentives and elect the regulatory scheme that favors them, not their ratepayers,[332] as noted above, the available LEC productivity data suggests that small and mid-size LECs may not be more productive than the RBOCs and GTOC and thus could not "game" the price caps system by electing price cap regulation in order to take advantage of lower productivity factors. In light of this fact, we believe that the diversity of LECs and the incompletely developed record on productivity caution against a broader mandatory application of the price cap system. We can always expand the program at a later date, as other companies prove equally or better able to meet the standards we set today for the largest LEC holding companies and their cost affiliates or as we develop a better record regarding the productivity of smaller and mid-size LECs.

2. Price cap participation and pooling

266. The relationship between pooling and price cap regulation is fundamental to the rules defining LEC eligibility for price cap regulation. We have repeatedly emphasized in this proceeding that price cap regulation will increase carriers' incentives to achieve heightened efficiency, which in turn will lead to lower rates. Participation in pools, by its nature, entails risk-sharing, and thus a weakening of incentives to operate efficiently.[333] We believe that the reasoning presented in the *Second Further Notice* against extending price cap regulation to NECA pool members remains valid.[334] We have accordingly determined that we must exclude these carriers from our price cap plan.[335]

267. To implement this decision, we adopt several new rules and slightly revise our current pooling rules. In order to elect price cap regulation, currently depooled LECs need only file a price cap tariff on or before November 1, 1990, with an effective date of January 1, 1991. Currently pooled LECs that wish to participate will be able to do so, but not until July 1, 1991, at the earliest. Under the rules we adopt today, currently pooled LECs will be permitted to withdraw from the NECA pools by the end of this year solely for the purpose of becoming subject to price cap regulation as of July 1, 1991.[336]

268. Many parties, particularly small and mid-size LECs, object to the rules proposed by the Commission that would prevent otherwise eligible LECs from joining price cap regulation on any date other than January 1, 1991. They suggest that such LECs be given one or more additional opportunities to participate in price cap regulation.[337] Apart from the concerns we expressed about multiple entry dates, none of the parties either support the single entry date or oppose the additional dates proposed by commenters. In comparing the benefits of price cap regulation for customers of such LECs with the burdens on this Commission of mangaging multiple entry dates, we find no reason to deny regular opportunities to elect price cap regulation. Accordingly, under the rules we adopt today, LECs participating in one or more pools will have an annual opportunity to withdraw from these pools for the purpose of entering price cap regulation.

269. A LEC's decision to elect price cap regulation under this new procedure will be irrevocable.[338] While we have determined that more flexibility is warranted on the question of LEC depooling in order to elect price cap regulation, we are still concerned about the possibility of manipulation, were we to allow LECs to alternate readily between rate of return and price cap regulation. In order for the price cap approach to work effectively, and for incentives to develop and influence LEC behavior and earnings, a LEC electing price cap regulation must make a permanent commitment. We accordingly determine that a LEC electing price cap regulation shall not have the option to return to rate of return regulation.

270. In addition, we share the concerns expressed by some commenters that it may be difficult for small and medium-size LECs to move directly from participation in one or more NECA pools to price cap regulation.[339] Accordingly, we delegate to the Chief, Common Carrier Bureau the task of developing and implementing procedures to enable such LECs to more easily develop the rates and related data needed to support their first price cap tariffs. These procedures are intended to reduce the need for costly and burdensome cost studies that are normally required to establish access rates upon leaving NECA pools.

3. "All-or-nothing" rule

271. The all-or-nothing rule provides that a LEC seeking to participate in price cap regulation will be required to convert all its cost affiliates (but not average schedule affiliates) to price cap regulation as well.[340] Throughout this proceeding, the Commission has expressed concern that if price cap regulation were to apply to some but not all affiliates of a LEC holding company, that company might be able to shift costs improperly from a price cap affiliate to a rate of return affiliate.[341] As a result of such shifts, customers of the rate of return affiliate could face excessive rates because costs associated with the price cap affiliate might be allocated to its rate of return affiliate's rate base. The all-or-nothing rule removes the incentives for LECs to engage in this improper cost shifting by eliminating the situation where one affiliate is under price cap regulation and one affiliate is under rate of return regulation. Because, as explained below, this is the best way to prevent cost shifting in the price cap environment, we adopt the all-or-nothing rule.

272. We reject claims that the all-or-nothing rule is not needed to prevent the improper shifting of costs from price cap to non-price cap affiliates. First, we do not agree with those who assert that there is insufficient evidence of actual or potential cost shifting to justify the rule.[342] Several parties noted that LECs had strong incentives to shift costs from price cap to non-price cap affiliates,[343] and we agree. The record in this proceeding, like the records developed in other proceedings before the Commission, demonstrates that LEC holding companies have both the means and the motive to shift costs improperly from affiliates under one regulatory system to affiliates under another system, to the detriment of ratepayers. At this time, and out of an abundance of caution, we believe the all-or-nothing rule best guards against improper cost shifting.[344]

273. Second, we reject assertions that other, allegedly less burdensome, non-structural mechanisms such as were used in the *Third Computer Inquiry* could be employed here in lieu of the all-or-nothing rule to prevent cost

shifting between price cap and rate of return affiliates.[345] In the *Computer Inquiry III*, the Commission adopted various methods to enable LECs to offer enhanced services and thereby maximize the efficient and effective use of the public switched network, and to enable other enhanced service providers to gain access to that network on reasonable terms. The non-structural approach adopted there involved, in part, a set of detailed accounting rules for allocating costs jointly shared by RBOC basic services and enhanced service operations, as well as an audit procedure to ensure compliance with the allocation rules. We find that adoption of analogous rules and procedures for price caps is unwarranted at this time. Unlike *Computer III*, where the record indicated that structural safeguards were imposing unnecessary costs and limiting RBOC participation in the provision of enhanced service to the detriment of the public interest, there is little evidence that the all-or-nothing rule will detrimentally affect those LECs subject to price cap regulation. As price cap regulation develops, however, we will monitor the situation carefully to determine if an alternative approach to controlling cost shifting is warranted.[346]

274. Third, notwithstanding the contentions of some commenters, we are not convinced either that current state regulation by itself is adequate to detect the type of cost shifting targeted by the all-or-nothing rule, or that because of the frequent size disparities between affiliated LECs, any significant cost shifts would be readily detected and disallowed.[347] While state regulation may be adequate to detect and prevent improper inter-affiliate and intra-affiliate cost shifts from the interstate category to the intrastate category, it is neither designed nor able to detect such cost shifts within the interstate jurisdiction. Thus, regardless of how effective state commissions may be in regulating the allocation of costs between the interstate and intrastate jurisdictions, there remains a strong need to deter improper inter-affiliate cost shifts within the interstate jurisdiction regardless of the relative size of the affiliates involved in each case. The all-or-nothing rule meets that need exceedingly well.

275. Finally, we reject claims that the all-or-nothing rule unfairly forces many LECs to forego price cap regulation because they are reluctant to depool their high-cost companies.[348] Although each LEC holding company (other than the RBOCs and GTOC) has the option to join price cap regulation, none is required to do so. Price cap regulation may be more attractive to one affiliate than another, but our requirement that both or neither join price cap regulation is not unfair in light of the strong need for this rule.[349] Accordingly, we reject the contentions of NECA, Alltel, and others that each LEC affiliate should be permitted to decide on a study area basis whether to participate in price cap regulation and whether to participate in NECA pools regardless of the elections made by other affiliates of that LEC.[350] Any LEC holding company electing price cap regulation, as well as all LEC holding companies subject to mandatory regulation, must convert all cost affiliates to price cap regulation.

276. While we believe that the all-or-nothing rule is important to the effective implementation of price cap regulation for LECs, we make one narrow exception to this rule to accommodate the needs of small carriers that use average schedules.[351] We will except average schedule companies from our rule because our concerns of potential cost shifting from a price cap LEC to a non-price cap affiliate do not extend to average schedule companies affiliated with a price cap carrier. Accordingly, when a LEC converts to price cap regulation, we will not require as a condition of such participation that all its average schedule affiliates convert to price cap regulation.

277. Average schedule companies are compensated for the costs of providing exchange access and transport services on the basis of formulas that are derived from aggregate exchange carrier data.[352] The settlements that an average schedule company receives depend upon the demand for the services that it provides rather than upon its costs of providing those services. As a consequence, average schedule companies are already subject to a form of streamlined regulation that creates economic incentives similar to those we seek to foster by adopting price caps for other exchange carriers. Under the average schedule formulas, average schedule companies retain the benefits that accrue from increases in productivity and reductions in expenditures, and therefore, like price cap carriers, have economic incentives to operate as efficiently as possible.

278. In response to our request for comments, only Michigan PSC and several LECs dealt with this issue.[353] The commenting parties other than Michigan PSC agree that average schedule companies should be exempt from the all-or-nothing rule for price cap regulation, as they operate under a form of incentive regulation.[354] USTA, representing the largest LECs as well as other LECs, also endorses this approach.[355] The all-or-nothing rule exception is designed to enable average schedule companies to maintain that status notwithstanding their affiliations with other LECs that may elect, or be required, to participate in price cap regulation. However, the creation of an average schedule exemption to the all-or-nothing rule requires a change to either the depooling rules or our price cap rules.[356] Our determination that average schedule companies may be exempted from the all-or-nothing price cap rule is in conflict with our NECA depooling rules, which require depooling on an all-or-nothing basis.[357]

279. The *Second Further Notice* suggested that we would carve a narrow exemption to the depooling rules, to allow average schedule companies affiliated with price cap carriers to remain on average schedule and remain in the NECA pool, despite their affiliation with price cap companies. Absent this exemption, the depooling rules would require that average schedule companies depool (*i.e.*, give up their average schedule status) when their affiliates depool, and price cap rules would require that average schedule companies participate in price caps when their affiliates do. The proposed exemption was supported by some commenters, as noted above, and was virtually unopposed. We have determined that it is consistent with our objectives in adopting price caps for other carriers, to permit LECs that are operating under the average schedules to continue to do so, even if one or more of their affiliates becomes subject to price cap regulation. We therefore retain the average schedule exemption from the all-or-nothing rule, and modify the Part 69 depooling rules to create a narrow exemption that allows average schedule companies to remain in the pool if, and only if, their depooling affiliate is depooling for the express purpose of changing from rate of return to price cap regulation.

4. Effect of the Alltel decision

280. We disagree with commenters who argue that the all-or-nothing rule fails to meeAlltel *v. FCC*.[358] We believe that the all-or-nothing rule that we adopt today complies fully with those standards. In *Alltel*, the Circuit Court remanded a Commission rule that if a LEC together with its affiliates earned $40 million or more in annual operating revenues, that LEC and its affiliates must be either all average schedule companies or all cost companies, but could not be a combination of the two. The *Alltel* court did not issue a blanket attack on regulatory distinctions premised on corporate affiliation, but simply concluded, on the record before it, that average schedule eligibility criteria for a single LEC that were based upon the aggregate revenues of that LEC and all its affiliates were not relevant to the stated purpose of those criteria, to avoid imposing unnecessarily burdensome costs on small carriers.

281. Our decision here is readily distinguishable from *Alltel*. Our purpose in requiring all-or-nothing participation in price caps is to minimize the improper shifting of costs from a price cap carrier to a non-price cap affiliate, whose customers would then pay excessive rates. Thus our requirement is directly related to a legitimate regulatory purpose. We adopt the all-or-nothing rule in this proceeding to limit the ability of LEC holding companies to shift costs from price cap affiliates to non-price cap affiliates, not as a means of distinguishing those LECs that can avail themselves of scale economies from those that cannot. Notwithstanding the later arguments of Alltel to the contrary,[359] we believe that the *Alltel* court rejected the Commission's affiliation rule because the record there did not reveal a relation between the object of the rule and a LEC's affiliate status. In the present case this relationship is clear and direct: the object of our all-or-nothing rule is the prevention of improper cost shifting between affiliates.[360]

5. Treatment of mergers and acquisitions

282. Future mergers and acquisitions involving LECs subject to price cap regulation must be anticipated. We must therefore address the extent to which LECs involved in such transactions will be permitted to retain their pre-transaction regulatory status. We find that a price cap carrier that acquires a non-price cap carrier (other than an average schedule company) will be required to convert that carrier to price cap regulation within one year after the effective date of the merger or similar transaction.[361] We believe that this one year "grace period" will enable LECs involved in such transactions to complete the studies and tariffs necesary to begin full participation in price cap regulation.

283. Several parties ask us to allow carriers involved in such transactions to retain their pre-transaction status, contending that any other rule would needlessly interfere with such transactions, and would conflict with the Commission's current policy.[362] In CC Docket 89-2, we adopted a rule under which LECs involved in mergers and acquisitions are permitted to retain their pre-transaction pooling status.[363] That rule was adopted in an effort to keep pooling rules neutral with regard to mergers and acquisitions. These parties urge adoption of a similar rule with regard to acquisitions involving price cap carriers.

284. As indicated by the price cap merger and acquisition rule that we adopt today, we do not believe it is necessary that this rule be consistent with the merger and acquisition rule that was previously adopted in the context of depooling.[364] We find that the incentives and limitations facing a company that has both price cap and non-price cap affiliates would be very different from those facing a company that has both pooled and non-pooled affiliates. Companies that are allowed to retain both pooled and non-pooled affiliates under the limited exception authorized in our existing merger and acquisition rule are all subject to rate of return regulation. As a result, these companies have little incentive to shift costs between pooled and non-pooled affiliates, since all such companies' earnings are limited to a unitary cost of capital that we impose. By contrast, a company with both price cap and non-price cap affiliates has a significant incentive to shift costs from its price cap to its non-price cap affiliates, since the total dollars these latter companies will earn will be increased as their rate bases increase. We believe that this difference justifies requiring price cap carriers to convert all acquired or merged companies to price cap regulation, as described above.

D. Evaluation of Price Cap Tariffs

285. The price cap tariff filings requirements discussed below are intended to honor the system of price caps and pricing bands we have created in previous sections. Tariff filings that include rate changes in which the rate is below the applicable price cap and within the annual price bands will be granted streamlined treatment – filings may be made on 14 days' notice and will be presumed lawful. Filings that propose rates outside these defined boundaries will be subject to longer notice periods, will not be presumed lawful, and require different types of cost support.

286. In designing the tariff filings requirements to employ in a price cap system for LECs, we have drawn heavily upon the tariff review requirements we put in place for AT&T's price cap system.[365] The LECs are, however, subject to a different version of price cap regulation due to the operation of prescribed "backstop" mechanisms affecting total interstate earnings levels. In the discussion below, we describe how the price cap system we have tailored for LECs will alter our tariff filing requirements.

1. Annual filings

287. Previous notices have stimulated little comment on the issue of the annual filing.[366] We believe that a periodic filing is necessary to allow LECs to adjust their indexes as specified herein, and to allow this Commission to review and evaluate those adjustments and the LEC's resulting rates. We therefore adopt the tentative conclusion of the *Second Further Notice*, and direct all LECs participating in our price cap plan to submit an annual filing demonstrating compliance with the price cap rules. As we have done under rate of return, we delegate to the Common Carrier Bureau the task of determining the format and requirements of these filings through the issuance of a Tariff Review Plan.

288. In the annual filing, each LEC will be required to show that it has correctly adjusted the price cap indexes for each basket, based on the GNP-PI and productivity offset as well as any relevant exogenous changes. The LEC's annual filing will also demonstrate that the actual price index for each basket does not exceed the relevant price cap index, and that all rates are within the applicable price cap bands. The LEC filing will also reflect any prospective rate adjustment that arises due to the

operation of the sharing requirements, and any PCI change caused by the operation of the low end adjustment mechanism. Finally, we require the LECs to include a complete rate comparison schedule contrasting existing and new rates. The LECs shall make these filings on 90 days' notice with an effective date of July 1 of each year. Thus, the first annual price cap filing will be due April 2, 1991, with an effective date of July 1, 1991.

289. Consistent with the regulatory scheme already in place for AT&T, we will restrict the LECs' annual price cap filing to changes in rate levels and to the incorporation of previously-introduced "new" services, as described below. We will permit LECs to make changes in discounts or tapers in their annual filings to the extent such changes require only minor modifications to tariff language and do not require recalculation of estimated base period demand in the API and SBI calculations. Although we anticipate that most LEC rate proposals will fall within the no-suspension zone, we will not preclude LECs from including above-band or above-cap rates in their annual filings, accompanied by required showings. Such rates will not, however, be subject to the same presumption of lawfulness that will apply to within-band, within-cap filings.

2. Within-band, within-cap filings

290. We received many comments in response to the proposal in the *Second Further Notice* to streamline LEC tariff filings that change rate levels, as long as the change in service rates produced an Actual Price Index (API) for the basket to which the service was assigned that was no greater than the Price Cap Index (PCI), and the new rates satisfied the pricing band limitations. While some parties support our proposal,[367] some object to our allowing such filings to be made on 14 days' notice, based primarily on arguments that LEC monopoly power means that rates will be unjust and unreasonable.[368] Other commenters object to the presumption of lawfulness, stating that the LECs face no competition, and that this alone should persuade us not to grant these filings a presumption of lawfulness, and to allow them to be more easily challenged.[369] Some commenters suggest that additional restrictions should be included in our review of within-band, within-cap filings -- that we should restrict changes in non-recurring charges,[370] cap the price of individual rate elements for the duration of an access year and apply the within-band criteria at that less aggregated level,[371] or even that we should keep rates tied more directly to individual carrier costs.[372]

291. We do not find these pleadings persuasive. The price cap mechanism we adopt has been carefully designed to ensure that ratepayers will benefit from price cap regulation, and to limit objectionable practices by the LECs. The sharing mechanism provides further protection against unreasonable rates. Our decision to separate LEC services into four baskets and to subdivide those baskets into service categories constrains precipitous changes to prices, and reduces LEC ability to shift the cost of one type of services to another class of ratepayers. Finally, we retain the complaint process as an avenue to challenge discriminatory rate increases. These safeguards justify our decision to allow streamlined review of within-band, within-cap filings. Customers of LEC interstate offerings typically purchase a service, not individualized rate elements. Changes in individual rate element prices may or may not affect the price of the service in any substantial way. Particularly in the special access category, which includes literally thousands of rate elements, we believe the best course is to band at the service category level.[373]

292. Several commenters are concerned that the burden to challenge such filings is too high, and that relevant data may not be available to opponents of LEC filings.[374] Some of these parties assert that we have failed to provide clear standards for the challenge of such rates.[375] Several opposing parties state that our plan will result in a severe lack of availability of cost data and meaningful review thereof.[376]

293. We do not believe that the burden of challenging these rates is too high, in light of the limited "no-suspension zone" we have created. The presumption of lawfulness applies only to the suspension decision, and does not survive if the tariff is set for investigation or if a complaint is filed.[377] We find it unlikely that rates based on existing LEC rates, as constrained by the price cap formula and sharing mechanism, would be unreasonably high. Given our findings, we affirm the presumption of lawfulness of within-band, within-cap rates. Parties seeking suspension of within-band filings must meet the substantial showing set forth in Section 1.773(a)(1)(iv) of our Rules.[378]

294. The high standard we have set for petitioners seeking suspension of within-band filings is not an indication that we are reluctant to examine such rates changes. Rather, it is a reflection of our belief that the risk of carriers filing within-band rate changes that are nonetheless unreasonable is low. We emphasize, however, that we do not expect petitioners to do the impossible in support of their suspension requests. We will, where warranted, require carriers to come forward with additional rate information.[379] Petitioners should also recognize that a showing insufficient to justify suspension of a within-band filing could contain enough evidence to persuade us to investigate, and could serve as a basis for a complaint under Section 208 of the Act.

295. We believe the instant tariff review and filing procedures are consistent with Section 204(a) of the Communications Act.[380] Our procedures reasonably reflect the equitable balance between ratepayer and shareholder interests that Congress incorporated into the Section 204 hearing process. The presumption of lawfulness we have attached to these filings does not alter this balance, because the ultimate burden of proof remains with the carrier. Our presumption involves only a preliminary assessment of whether the proposed tariff should go into effect without suspension, not whether the tariff itself is lawful on the merits under the Communications Act. Once we designate a filing for investigation, it is the carrier's responsibility to demonstrate the justness and reasonableness of the rates at issue. Accordingly, we affirm that we will apply streamlined regulatory procedures to LEC tariff filings proposing rate level changes which satisfy our rate band limitations and which produce an API for the relevant basket that is no greater than the PCI. Under this approach, LEC requests for within-band, within-cap rate level changes shall be made on 14 days' notice and shall be accompanied by the supporting information set forth in the new Sections 61.49(a) and (b) of our Rules, 47 C.F.R. §§ 61.49(a) and (b).

3. Above-band, within-cap filings

296. The Commission's proposal to require 90 days' notice for any tariff filing which proposes to raise rates above the 5 percent price band similarly stimulated much comment.[381] Some LECs contend that the 90 day notice period is excessive,[382] or that the whole proposal is burdensome and could result in unconstitutional confiscation.[383] They also assert that the proposal in fact would afford ratepayers ample protection from cross-subsidization and large price increases.[384] USTA generally supports our proposal as balancing the needs for limited pricing flexibility and additional customer safeguards.[385]

297. The Commission's conclusion that such tariffs would face a high probability of suspension and that, to become effective, they would have to be supported by a showing of substantial cause, did not assuage the concerns of some commenters. Some opponents assert that "substantial cause" is too light a burden,[386] and that carriers filing such rates should be required to show that they will suffer "unconstitutional confiscation" of their property if their requested above-band rate increase is not allowed to take effect.[387] Several other parties attack our proposed above-band standards as too vague or too weak.[388]

298. We conclude that we will require 90 days' notice for any tariff filing which would raise rates above the 5 percent price band. We have chosen a 90 day notice period because above-band rates raise questions about the distribution of rate increase burdens that require the fullest possible consideration by this Commission. Furthermore, a 90 day period will enable interested parties to conduct the type of analysis necessary to submit meaningful, substantive comments. Above-band, within-cap rate level changes will also face a high probability of suspension.

299. We expect LECs to present a compelling argument that the above-band increase was due to unexpected, unforeseeable, and unusual circumstances. We are satisfied that substantial cause is the proper standard for evaluating these filings. In the *AT & T Price Cap Order* the Commission defined the test and stated how it will be applied. [389] The Commission specifically designed the substantial cause test to aid in the evaluation of tariff changes in circumstances in which customers have a legitimate expectation that change will not occur.[390] Above-band rate increases fit this mold. Our price cap plan creates in ratepayers the legitimate expectation that no individual rate will rise more than 5 percent each year, adjusted for changes in the price cap. Above-band increases act to undermine this expectation. While LECs may, in their discretion, file above-band rates, we consider it appropriate, as part of our carefully calibrated balance of ratepayer and shareholder interests, to impose the higher burden of substantial cause when carriers choose to exceed our pricing bands.[391]

4. Above-cap filings

300. The *Second Further Notice* suggested a higher standard for tariffs proposing above-cap rates,[392] and we adopt that proposal here. In response to the *Second Further Notice* proposal, two LECs argue that the standards for above-cap filings are too strenuous,[393] and a third asserts that this policy violates the doctrine of "carrier-initiated" rates.[394] Ad Hoc reasserts its position that the Commission should permit above-cap filings only if the carrier demonstrates that it will suffer unconstitutional confiscation of its property without the above-cap rate increase.[395]

301. We do not find these arguments persuasive. We believe our standards for above-cap filings are appropriate in light of the overall degree of pricing flexibility we are affording the LECs. We find it unlikely that within the next four years our price cap formula will stray so far from actual costs that the cap will produce unreasonably low rates. We are initializing price caps based on existing rates. We are also allowing rates to move with inflation and changes in other exogenous costs. Thus, we conclude that it is only fair, from a ratepayer perspective, to set high hurdles for above-cap increases.

302. US West claims that we risk violating the doctrine of carrier-initiated rates if we require a LEC subject to mandatory price cap regulation, to meet a high standard for an above-cap rate filing. We understand the doctrine of carrier-initated rates to limit our ability to bar the filing of tariff revisions by a carrier in such a way as to require that current tariffs be retained without change.[396] The regulatory regime we are adopting for LECs does not disturb this doctrine. With our above-cap filing requirement, we impose no bar on tariff filings by LECs subject to mandatory price cap regulation. Instead, we simply clarify, in accordance with our authority to set standards for tariff review and pursuant to our obligation to assure that rates remain just and reasonable, that when above-cap rates are filed, a different and higher review standard will be applied than when the rates filed are within the cap. We are not prescribing any particular rates, nor are we requiring or forbidding any particular tariff revisions --carriers remain free to decide when tariff revisions are to be filed and the nature and extent of those revisions.[397]

303. We conclude that we will permit LECs to file tariffs proposing above-cap rate increases on 90 days' notice. Our review of these filings will be thorough and exacting.[398] LECs should be prepared to submit extensive support materials in defense of their above-cap rate proposals.[399] We have chosen stringent review standards in order to preserve the price cap incentive to reduce costs and keep rates within a zone of reasonableness. In support of an above-cap rate increase, LECs shall include with their proposals: (1) cost support data broken down to the lowest possible level for each relevant basket for each of the most recent four years under price cap regulation; (2) a detailed explanation of the reasons for the prices of all rate elements to which the LEC does not assign costs; (3) a comprehensive explanation of how the carrier allocated costs among rate elements in the relevant basket; and (4) an explanation of the manner in which the LEC has allocated all costs, not just exogenous costs, among all baskets. This last element is particularly important if we are to guard against any cross-subsidy between less- and more-competitive services.

304. Above-cap filings will be found lawful only in the unlikely event that these rules have the effect of denying a LEC the opportunity to attract capital and continue to operate, despite the low end adjustment mechanism and the opportunity provided the LEC to increase its earnings through greater efficiency.[400] A LEC may request an above-cap rate increase by filing a tariff transmittal that complies with specific rules for such filings, a showing that includes but is not limited to the cost support information normally required in annual access tariff filings for LECs subject to rate of return regulation, and other information sufficient to establish that the increase is needed if the LEC is to have an opportunity to attract capital. We anticipate that any such increase will present

issues requiring a investigation and, as a protection for ratepayers, suspension of the increases until that investigation is completed or for the statutory period of five months.

5. Below-band filings

305. The *Second Further Notice* proposed that tariffs decreasing rates by more than 5 percent adjusted for changes in the PCI would be filed on 45 days' notice, and would be accompanied by a showing that the rates cover the costs of providing service and are otherwise just, reasonable, and nondiscriminatory.[401] The Commission suggested that the average variable cost standard adopted for AT&T should also be used as the standard by which to determine whether LEC proposed rates were predatorily low.[402] This proposal stimulated much comment, with views ranging from those opposing any restriction on rate decreases to those asserting that additional restrictions are necessary, or that below-band filings should face traditional, rate of return regulation.

306. The LECs are divided in opinion on this proposal. Some offer qualified support.[403] LEC opponents of our below-band proposal assert that no restrictions on downward price movements are necessary. They state that if there were an increase in the PCI, our proposed below-band standards would effectively raise the limit of the lower band, thereby driving rates which were previously just inside the lower limit down below it.[404] Two LECs argue that there should be no lower band restriction at all.[405]

307. Other opponents of the proposed treatment of below-band tariffs state that it is based on the erroneous assumption that keeping prices above average variable cost will eliminate the possibility of predatory pricing.[406] This may be true in a competitive market, these commenters suggest, but given LEC monopoly power, a more conservative approach is warranted.[407]

308. Other parties assert that the LECs are in effect demanding streamlined review for all rate reductions, regardless of magnitude, for the purpose of engaging in predatory pricing. They believe that the adoption of an average variable cost standard as the basis for permitting below-band rates will remove the last vestige of protection against anticompetitive behavior by the LECs.[408] One commenter concludes that we should continue to subject below-band rate reductions to traditional tariff review, including the cost support requirements of Section 61.38 of our Rules.[409]

309. We believe that rate reductions are generally beneficial to consumers and, more often than not, are undertaken for competitive reasons. Predatory pricing, though often alleged, is fairly uncommon, and proven cases are rare.[410] Further, our LEC service basket structure lessens the already unlikely occurrence of predation. We are convinced that below-band reductions introduced under our price cap system will be more pro-competitive than predatory; nonetheless, we have decided to err on the side of caution and not accord below-band filings streamlined tariff review. Therefore, we seek a standard which requires suspension only of those rates which are so low that they can be presumed to be anticompetitive.

310. We believe that average variable cost provides just such a standard. While disagreement exists on the point at which prices can be presumed legal, and on the role of intent in finding antitrust violations,[411] the question whether prices are below marginal cost, or its surrogate, average variable cost, is central to the determination of whether prices are predatory. In adopting average variable cost as a tariff review standard, we do not find that all rates which cover average variable cost are necessarily just, reasonable, and non-discriminatory. Petitioners may be able to show that there is reason to investigate a rate decrease which we permit to go into effect after 45 days. Competitors can also file complaints alleging predatory pricing. In either case, it might be possible to show that the resulting rate is above average variable cost but nonetheless predatory using relevant antitrust analysis and precedent.

311. We accordingly direct all LECs seeking to introduce below-band rate reductions to file their transmittals on 45 days' notice. Below-band rate filings must be accompanied by a showing that the rates cover the cost of service and are otherwise just, reasonable, and non-discriminatory. In reviewing these tariffs, we will employ the average variable cost standard to determine whether a below-band reduction should be suspended pending investigation.

6. New and restructured services

312. In the *Second Further Notice* the Commission proposed to distinguish between new and restructured services and to treat them as they are treated under AT&T's price cap plan.[412] Some parts of the proposal drew little comment (*e.g.*, definitions) while others stimulated a large response. Below, we define new services as any that enlarge the range of service offerings available to customers (*i.e.*, all existing offerings remain available). We define restructured services as any that modify a method of charging or provisioning a service that does not result in a net increase of service options available to customers. We also decide that new services will not be incorporated into the price cap system immediately, but will be included in the LEC's cap in the first annual price cap tariff filing after the completion of the base year in which the new service becomes effective. Finally, we conclude that restructured services will be filed on 45 days' notice and must demonstrate compliance with the price cap and banding limits of the basket to which they belong.

a. Definitions

313. The proposal to distinguish between new and restructured services in a manner identical to the treatment of new and restructured services offered by AT&T under price caps drew little comment.[413] Some of the comments relating to the proposed definitions concern matters not directly related to price cap regulation.[414]

314. New and restructured services, because they present different issues, must undergo separate forms of regulatory analysis. It is important, therefore, to set a standard for distinguishing these services from one another. We will consider as new, services which add to the range of options already available to customers. A new service may, but need not, include a new technology or functional capability. Many new services are, in essence, re-priced versions of already-existing services. It is indeed rare for a carrier to offer a wholly different form of telecommunications service. As long as the pre-existing service is still offered, and the range of alternatives available to consumers is increased, we will classify the service as new. Restructured services, on the other hand, involve the rearrangement of existing services. Carriers can

restructure a service by changing an existing method of charging or provisioning, by changing a term or condition, by adding language, or by adding, consolidating, or eliminating rate elements. When a service has been restructured, the previous version of that service no longer exists. We believe that this standard is clear, and will allow us to distinguish new services from existing, restructured ones. The 45 day notice period applicable to both new and restructured services will allow us to detect and order correction of mischaracterized filings.

b. New services: tariff standards

315. Many pleadings responded to the proposal in the *Second Further Notice* that new services be submitted on 45 days' notice, and held outside of price cap baskets for a limited period.[415] The *Second Further Notice* also proposed that new service tariffs be supported by a net revenue showing, under which a new service must be shown to increase the LEC's net revenue within specified guidelines.[416]

316. Most LECs agree that new services should be held outside price caps for some initial period, since placing them in price cap regulation immediately would discourage carriers from developing new products and services.[417] Further, most support the use of the net revenue test to determine the cost support to accompany new filings. The LECs argue, however, that we should modify the requirement that new services be subject to a quarterly reporting requirement.[418]

317. Other parties argue that the net revenue test proposed in the *Second Further Notice* is insufficient to protect competitors and users, and some suggest that new services should be subject to traditional tariff review standards, including full cost support and quarterly reporting of all costs, revenues, and expenses.[419] The LECs respond that the proposed treatment of new services provides substantial assurance that the service will meet Commission requirements.[420] One commenter suggests that we scrap the net revenue test in favor of competitive forces (where appropriate) or, in their absence, rate bands.[421] Some parties also raise the possibility of a different standard for small and mid-sized LECs, which might not be as able as larger LECs to meet such a test.[422] The proposal that this test be applied to each unbundled rate element in a new service offering also stimulated comment.[423]

318. Commenters disagree over the "payback period," the time period in which a new service must generate net revenue, with LECs arguing for a longer period.[424] Other commenters argue, however, that the proposed payback period is too long.[425] Not surprisingly, commenters also had widely varying views on the 45-day notice period for new services, with LECs arguing in favor of additional streamlining,[426] and opponents urging that 45 days' notice is essential.[427]

319. We believe permitting new services a brief period of relative flexibility will strengthen carrier incentives to innovate. Accordingly, we will not incorporate new services into our price cap system immediately, but will keep them outside of price caps for a time, as proposed, in order to enable LECs to develop the historical demand figures we require for computation of our price cap formulas. In the meantime, we will examine the new services to determine their effect on the revenues of capped services. These new services will then be included in the cap in the first annual price cap tariff filing after the completion of the base year in which the new service becomes effective. We believe this "payback period" is essential to the development of incentives to innovate.

320. We also realize, however, the need to provide standards and assurances. We believe that the 45-day notice period is both necessary and reasonable, and will allow this Commission ample opportunity to decide whether it is necessary to reject, suspend, or investigate any tariff filing implementing a new service. We also conclude that the net revenue test is necessary and sufficient, and we direct the Chief, Common Carrier Bureau to establish requirements for LEC documentation to show compliance with this standard. We believe the net revenue test will assuage concerns that in those service markets for which the LECs are subject to competition, *e.g.*, high capacity facilities in urban areas, new services might enable a LEC to propose predatorily or discriminatorily low rates to certain customers. We conclude that the data submitted in satisfaction of this test will be sufficient to allow this Commission and interested parties to determine whether the proposed rates for a new service are reasonable. We also believe that quarterly reporting will not be burdensome to the LECs, and will be helpful to this Commission and to interested parties.[428]

321. Tariffs proposing new services shall be filed on 45 days' notice, with supporting information and data to demonstrate compliance with the net revenue test. In order for us to judge compliance with this standard, LECs must support their revenue projections with documentation: (1) measuring revenue effects on a present value basis; (2) detailing demand, cost, revenues, elasticity, and cross-elasticity of demand associated with the new service; and (3) explaining all assumptions, estimates, and cost allocation methods employed in developing the above information. While each rate element need not satisfy the net revenue standard, LECs must show that the new service imposes no unreasonable restriction on customer resale, sharing, or interconnection. For new services as for restructured services, discussed below, Part 69 limits continue to apply. Finally, LECs must file quarterly reports comparing actual operating results with projections, beginning six months after the initiation of the new service. The treatment of ONA services is discussed in part IV.A., *infra*.

c. Restructured services: tariff standards

322. The *Second Further Notice* tentatively concluded that restructured offerings of services already within price cap regulation should remain in the same price cap service baskets and categories upon restructuring, with adjustments made to the actual price index and service band index to reflect the new structure.[429] While SWB agrees with that proposal,[430] other LEC commenters seek modification.[431] Opponents argue that the proposed approach offers inadequate protection for competitors and users, and that restructured services should be subject to full, traditional tariff regulation.[432] Executive Agencies suggests the same treatment for restructured services as it does for new services.[433]

323. The *Second Further Notice* also tentatively concluded that restructured filings should be offered on 45 days' notice. Several LECs argue that this is unwarranted, and urge that we adopt a shorter period.[434] Other parties object to any shortening of the notice period.[435]

324. Since other safeguards in the price cap plan already protect against the possibility of predation, our review of restructured services will focus on the possibility of unreasonable discrimination. The more serious concerns about discrimination and rate levels that may arise with respect to restructured services cannot be addressed adequately in 14 days. Therefore, we will retain the conventional tariff review period for restructured services. In addition to the 45 day notice period, LEC restructured service filings must contain a showing demonstrating compliance with the price cap and banding limits of the basket to which the service belongs. We will review this showing carefully, to ensure that the restructuring did not produce unreasonable discrimination among service users nor have any other anticompetitive effects.

325. LECs subject to price caps should continue to adhere to the rate structure requirements of Part 69 for the switched access elements. A primary purpose of the rate structures embodied in Part 69 is to eliminate unreasonable discrimination between service users. When these service users are interexchange carriers or enhanced service providers, these rules also promote competition in two markets in which we have concluded that a competitive market structure will promote the public interest. In the face of the significant market power retained by LECs in the provision of interstate access, rules that discourage unreasonable discrimination and its potentially adverse effect on competition should be given precedence over the benefits that might come from LECs' ability to depart from the Part 69 access rate structure. We continue to believe that the waiver process offers a better forum than the tariff review process for identifying and weighing the advantages and disadvantages that accompany departures from those rules. For this reason, we conclude that unless a LEC first obtains a waiver of the Part 69 rules, its price cap filings must continue to comply with the sections of that part prescribing the structure of interstate access elements, including those setting guidelines for optional carrier common line tariffs and the relationship between rates for premium and non-premium access.

E. Small company issues

326. Throughout this proceeding, the Commission has reaffirmed its commitment to a range of programs that provide assistance to small and high cost telephone companies and their subscribers, as well as to low income subscribers generally. These programs, including the Universal Service Fund, Long Term Support, Transitional Support, Link Up America, and Lifeline Assistance[436] share a common purpose: promoting affordable telephone service throughout the United States. Because these programs were adopted within the framework of rate of return regulation, we have requested comments on steps that might be necessary to ensure that these programs continue to operate, intact, under price cap regulation.

327. In the *Further Notice*, the Commission proposed to modify rules in Parts 65 and 69 of the Rules to eliminate use of a prescribed rate for calculating revenue requirements, and otherwise alleviate administrative burdens.[437] These proposals were non-controversial, except for their potential effect upon the calculation of obligations under universal service programs. Those include the calculation of a common line revenue requirement for the entire industry, as a basis for Long Term Support payments to companies remaining in the NECA common line pool.[438] These payments are intended to keep the CCL rate charged by the many small companies in the NECA pool no higher than the nationwide average CCL rate. In the *Second Further Notice* we proposed to amend the cost allocation requirements in Part 69 to require price cap carriers to allocate expenses and investment between common line and all other costs, in order to permit proper calculation of these payments. We also requested comments on alternative ways to assure continued success of the program, without requiring the application of these cost allocation requirements to price cap LECs.

328. In its supplemental comments, NECA recommends that the Commission base the NECA pool rate and the Long Term Support payments on the prospective CCL *rates* of exchange carriers subject to price caps, rather than prospective revenue requirements and demand. It contends that this modification will better preserve the policy of rate parity and simplify administrative requirements.[439] This proposal was supported by other LECs.[440] The one concern among the LECs, raised by NTCA, was that LECs subject to Long Term Support payments might deliberately accept lower earnings for traffic sensitive (TS) services and a higher rate for CCL, within price cap requirements.[441] This would have the effect of raising the nationwide average CCL rate and lowering the calculated Long Term Support payments. NTCA nevertheless recommends adoption of the NECA proposal, but suggests safeguards to prevent this subversion of the purpose of Long Term Support. AT&T opposes NECA's proposal, arguing that it might allow CCL rates to rise substantially if a per line formula is not used.[442] AT&T contends that the result would be higher NECA CCL rates and lower support payments to pool members, penalizing carriers who serve customers in NECA company territories.[443]

329. NECA members are those directly affected and benefited by Long Term Support. NECA's recommendation on their behalf does address our goals of reducing administrative burdens on price cap LECs. However, it is less clear whether the proposal might have an unwanted impact on NECA CCL rates and Long Term Support payments. The concerns raised by NTCA and AT&T justify caution at least until we can assess the actual impact of NECA's proposal in practice. Accordingly, we will not adopt the proposal at this time, but will grant NECA leave to submit additional data, including calculations of the proposal's impact, by petition for reconsideration.

330. A number of other issues of special interest to small telephone companies also appear to require further consideration as we move into price cap regulation. Among the issues that might require inquiry are the impact of regulatory change on NECA and the pools, and the impact on average schedule companies. Also, rate of return calculations have largely been developed from the capital costs of the large telephone companies and then applied on a unitary basis for all LECs. With the transition from rate of return regulation to price caps for large LECs, some modifications of this process may be desirable. We have also strongly reaffirmed our commitment to geographic rate averaging in this proceeding.[444] Some commenters have suggested that the adoption of price caps for AT&T and the LECs might threaten this policy.[445] We believe this is unlikely, in view of the safeguards built into the plan and the continuation of the various universal service programs. Nevertheless, the Commission will continue to monitor this issue closely, and is committed to taking action in the future should our policies with respect to geographically averaged rates be threatened.

331. This proceeding has stimulated much comment and interest from small and midsize LECs who seek regulatory reform that will reduce administrative burdens and increase flexibility and efficiency, while continuing to assure high service quality and universal service at reasonable rates. We share these goals and interests, and we have accordingly determined to initiate further proceedings dealing specifically with regulatory issues of concern to small and midsize LECs. We intend to develop a better record on the issue of whether and in what cases a lower productivity factor for small and mid-size LECs is appropriate, to provide a focused basis for their participation in price cap regulation. We will also undertake to examine various other regulatory options. As noted above, many states have developed regulatory approaches that recognize the unique circumstances that face small LECs. Options such as pricing flexibility, sharing, price freezes or rate moratoriums, price caps, some hybrid approach, and others are currently in use. We will need to consider the best regulatory approach to adopt for interstate purposes. In general, we will continue to examine the range of issues affecting small telephone companies and their customers to ensure that desirable regulatory reforms are applied to small telephone companies as far as possible, and applied with sensitivity to their special circumstances.[446]

III. MONITORING

A. Service quality and infrastructure development protections

332. This Commission is committed to assuring the availability of high quality, innovative communications services, and to the development of the telecommunications infrastructure needed to provide these services. We are confident that incentive regulation can provide the local exchange carriers with the impetus and opportunity to create and advance a communications network that will keep the United States at the forefront of a worldwide "information economy" approaching $1 trillion this year. In an increasingly services-based economy, communications technologies are more and more important. One of the fundamental goals established by the Commission is "to encourage the development of a competitive, innovative, and excellent American communications system."

333. A primary tool in this effort is price cap regulation, which will encourage the LECs in network modernization, advanced applications, and new services, through appropriate investment incentives. The price cap plan is designed to help strengthen the competitiveness of American industry in domestic and international telecommunications markets, and to ensure that consumers share in the benefits of the information age through lower rates and a wide array of high quality services.

334. In the earlier Orders in this docket, the Commission recognized the theoretical concern that LECs under price cap regulation might seek to increase their profits not by becoming more productive, but by lowering the quality of the service they provide. Some commenters argue that price cap regulation will produce a perverse incentive for LECs to reduce or delay investments needed to maintain and improve service quality, because the LECs would be allowed to keep as profits the resulting "savings."[447] Other commenters argue that LECs would have strong incentives to shift their investments to other, potentially more lucrative enterprises, and to provide improvements only to customers in urban markets, to the detriment of smaller, harder-to-serve customers. The result, commenters argue, would be declines in needed expenditures, and service deterioration.[448]

335. We continue to believe, as stated in previous discussions, [449] that under price caps the LECs will have increased incentive and opportunity to develop and introduce new services; to invest in new technology, like ISDN and SS7, that will promote cost savings and efficiencies; to innovate; and to upgrade their networks. These carriers are unlikely to jeopardize their network infrastructure, since it is their primary asset and is critical to their continued financial stability. We thus consider it reasonable to expect that price cap carriers will continue to maintain the quality of their network and improve service to customers. We also acknowledge, however, the need to ensure continued high quality service to ratepayers, and we recognize that we cannot predict with certainty the behavior of carriers operating under the price cap regulatory scheme, since they will be responding to different incentives than currently exist under rate of return regulation.[450] So, while we believe that our price cap plan creates strong incentives to maintain high quality and to develop the network, we will also expand significantly our monitoring of service quality and infrastructure development.

336. First, we will modify and continue our semi-annual RBOC service quality reporting, and make it applicable to GTOC. Second, we will supplement these reports with a quarterly service report from each price cap carrier, based on a modified version of a reporting plan proposed by BellSouth and Rochester, including data on installation intervals, repair intervals, and blocking percentages. Third, as a part of this quarterly filing requirement we will collect data on post-dial delay (PDD) and switch downtime. If our monitoring shows that service quality has deteriorated, we have the authority to set standards and to order carriers to undertake specific investments. We will not hesitate to use that authority if necessary.

337. In addition to the "safety net" created by our expanded monitoring of service quality and infrastructure development, the impact of state regulatory oversight of LEC facilities should not be overlooked. In many cases, the same facilities are used for provision of interstate and intrastate access, and the service quality standards and monitoring programs maintained by many states provide another layer of protection against degradation of service quality by the price cap LECs.

1. Service quality reporting

338. Our present service quality monitoring consists of the semi-annual RBOC report, technical standards in tariff filings, certain aspects of the ARMIS reports, and the complaint process. The Commission suggested in the *Second Further Notice* the expansion of service quality monitoring by the addition of a maintenance plan proposed by BellSouth and Rochester, as well as three other categories of service quality indicators. We have now decided not only to require a modified version of the BellSouth/Rochester reporting plan and the switch downtime and the post dial delay categories, but also to require a still further expansion of service quality and infrastructure monitoring.

a. Semi-annual report

339. The semi-annual RBOC report, currently collected and analyzed by the Common Carrier Bureau's Industry Analysis Division, contains reports on customer satisfaction, dial tone speed, transmission quality, blocking, and service order response time. The customer satisfaction reports are based on telephone surveys indicating a percentage of satisfied customers, and are collected from residential and business (or, sometimes, residential, small business, and large business) customers. The reports generally provide composite information on customer satisfaction indices. Dial tone speed reports calculate the percentage of offices providing dial tone within a carrier-established standard, generally 3 seconds.[451] Transmission quality reports calculate the percentage of offices meeting carrier-established standards regarding noise, balance, loss, and distortion.[452] The test components are similar for all companies, but the companies may measure them differently, and may have different standards as to whether an entity is characterized as "passing" transmission tests. Interpretation of these tests thus focuses on trends rather than on absolutes or intercompany comparisons.

340. Blocking reports calculate the percentage of calls uncompleted due to equipment failure or inadequate facilities. The toll network has historically been designed to produce a blockage rate under 1 percent for all busy hour calls.[453] The LEC network blockage rate may be somewhat higher, but is generally held under 5 percent. Service order response time reports calculate the percentage of service order responses meeting carrier- established standards.[454] These results are generally reported in three overall categories: residential, access services, and business/special services. This semi-annual reporting is conducted at the same level of aggregation as is used for tariff filing, so that some reports cover a single study area, while others aggregate on a company level.

341. Our review of the information contained in these reports and of the comments indicates that their coverage should be expanded to all LECs subject to mandatory price caps and their usefulness improved. Accordingly, we direct that GTOC join the RBOCs in filing these reports as of January 1, 1991. We also remove from these semi-annual reports the requirements regarding service order response time and network blockage. These measures are included in the quarterly reports required of all price cap carriers. We further direct that the semi-annual reports be filed with the first and third quarterly ARMIS reports each year. We delegate to the Chief, Common Carrier Bureau, the task of clarifying these requirements and assuring that the reports are as standardized as possible, and of establishing calendars and other requirements. In addition, efforts to make the reports more uniform will continue.[455] For example, the company-established standards in the transmission quality reports, while they may not be identical, must be similar enough to permit ready benchmarking.[456] These standards must be specified by each company, and cannot be altered without Commission approval.

b. Quarterly ("BellSouth/Rochester") reports

342. In the *Second Further Notice*, the Commission proposed to require that price cap LECs file additional data on service quality performance four times a year. This proposal was a modification of a plan suggested by BellSouth and Rochester, and was generally supported in the comments.[457] The modified plan we adopt requires three reports from all price cap LECs: installation interval reports, which calculate the percentage of service installations completed within carrier-established intervals; repair interval reports, measuring the average total number of hours to complete the requested repair; and network blockage reports, measuring the ratio of blocked call attempts to total attempts at busy hour.[458] The installation interval and blockage reports required here replace those required in the semi-annual report. We accordingly cancel those reports in the semi-annual data collection.[459] These reports should provide sufficient information to permit evaluation of LEC performance in areas of most concern to local customers, installing and maintaining their service and completing their calls. The reports will be filed in a standardized format as part of the quarterly ARMIS filing. We have decided against requiring uniform standards, at least at this time, but we do intend to move toward uniformity and standardization in LEC reporting, and we will require all carrier reports to be based upon standards that permit ready benchmarking.[460] We delegate to the Chief, Common Carrier Bureau, the establishment of the reporting format and filing schedules, and direct the Bureau to achieve as much uniformity among LECs as possible.

c. Additional reporting categories

343. In the *Second Further Notice*, the Commission sought comment on requiring quarterly reports of other service quality indicators, including post dial delay (PDD), switch downtime, and transmission quality.[461] Many commenters assert that the proposed BellSouth/Rochester reports are sufficiently complete, without the inclusion of additional reporting categories which are burdensome and unnecessary.[462] Virtually all the LECs argue that reports on the additional categories are difficult to obtain or compile, and are of limited usefulness. Other parties aver that PDD, transmission quality, and switch downtime are necessary, create measurable means of evaluating service quality, and should be required.[463]

344. Post-dial delay, or PDD, is the time between the dialing of the last digit and the response of a "winkback," or acknowledgment of signal receipt, from the interexchange carrier.[464] While some parties argued for the addition of service quality reporting generally, the LECs uniformly opposed our suggestion that we might include PDD reporting.[465] The LEC objections seem to be predicated on a different, more inclusive definition of PDD (from dialing of last digit to ring or busy signal) than interests us here. PDD as we define it is certainly recorded by the LECs, as it is essential for their preparation of access billing, among other things. While we are aware that PDD may be affected by factors other than LEC service quality, such as whether the interexchange carrier connects at an end office or a tandem, it is still a good service quality indicator because an increase in PDD flags a possible degradation in service quality generally. We also believe that an inclusion of PDD reporting in our service quality monitoring requirements is not burdensome. We are persuaded that PDD data will allow interested parties, including the Commission, to be informed and aware of, and therefore more responsive to, changes in the network. We will accordingly direct the Common Carrier Bureau to require quarterly filing of PDD data.

345. Most LECs also object to the inclusion of a transmission quality category, stating that the BOCs already file this information elsewhere (referring to the semi-annual reports), and that the interexchange portion of the network is equally responsible for transmission quality.[466] Further, they contend, any LEC transmission quality problem would result in an interexchange carrier complaint (to the LEC or to the Commission), since most interexchange carriers perform their own transmission quality monitoring.[467] Other commenters assert that the BellSouth/Rochester plan adequately measures transmission quality through its blockage category, and that LEC tariffs contain transmission parameters that can be checked in the tariff review process.[468] SNET also asserts that there is no consensus among LECs regarding how transmission quality should be measured.[469] No pleading contradicts the LECs' assertions or argues for inclusion of a transmission quality category.

346. We conclude that inclusion of transmission quality reports in our quarterly service quality data filing is neither necessary nor justified. Except for Pactel, which states that it has no objection to this requirement, no party commented in favor of this added requirement. We note that transmission quality is already measured in the semi-annual report. Further, the blockage measure established in the BellSouth/Rochester plan, together with the newly-required PDD report, will provide an indicator of transmission quality.

347. Seven LECs and USTA state that they have no strong objection to the inclusion of a switch downtime category, while three oppose it.[470] BellSouth notes that switch downtime is effectively covered by the network blockage category in the BellSouth/Rochester plan.[471] Others argue that they cannot disaggregate intrastate and interstate for switch downtime, that the category is of no relevance to the provision of access service, or that there is no consensus on what constitutes downtime.[472] SNET notes that a LEC under price cap regulation simply has no incentive to allow this type of service degradation to occur.[473] Other parties, however, support the addition of a switch downtime reporting requirement.[474] We believe that a switch downtime report would convey useful information without imposing an unjustifiable burden. We will leave to the Common Carrier Bureau the establishment of particulars regarding this reporting requirement.

348. Two parties suggest that an additional service quality report, on the quality and availability of interconnection, should be required from the independent LECs.[475] This matter is presently under consideration in another proceeding before this Commission, and we accordingly defer consideration.[476]

349. We are confident that the service quality reporting requirements we have now established -- the semi-annual report and the expanded quarterly report -- will provide us with sufficient data to evaluate LEC service quality under price caps. We delegate to the Common Carrier Bureau the responsibility of determining how and when these reports will be filed.

d. Reporting required by states

350. State monitoring programs will provide additional service quality safeguards. We have no desire to duplicate or impinge upon state monitoring programs, nor to intrude upon the states' authority concerning service quality. We are eager to cooperate with state commissions, to share service quality data with them, and to gain from their experience. While some commenters suggest that the Commission should establish a federal-state joint board to develop uniform nationwide service quality standards supplemented by detailed, geographically disaggregated reporting requirements,[477] we have determined that the development of such standards is not necessary at this time, in view of the monitoring programs we establish here. We reiterate our willingness and our desire to coordinate and cooperate with the states in the monitoring of service quality, however.

2. Infrastructure development

351. We believe that incentive regulation will encourage LECs to develop their infrastructure and promote innovation through the introduction of new service offerings. To ensure these developments -- and maintain high quality service -- we have directed the BOCs to file appropriate information so as to allow effective monitoring.[478] In CC Docket 89-624, the BOCs and GTOC filed historical data from 1980 to the present, and projections through 1994, on the following categories: (1) number of central offices by type of equipment (SPC, digital, equal access, SS7, ISDN); (2) number of access lines by type of office (same as above); (3) local loop transmission facilities by type of available channel (baseband, analog, digital, fiber, other); (4) local loop transmission facilities by type of channels in service (same as above); (5) interoffice transmission facilities by type of channels in service (circuits: baseband, analog, digital; carrier links: copper analog or radio, digital copper or radio, or fiber); (6) copper and fiber pairs available at main frames; sheath miles; fiber to users; and (7) gross construction in millions of dollars, including (a) number of access lines, (b) access lines gained, and (c) dollars per access line gained.

352. These data categories provide a good indication of infrastructure development. Further, because the recent filing includes a ten-year historical base, we can evaluate infrastructure trends. We are accordingly directing those LECs for whom price cap regulation is mandatory, the BOCs and GTOC, to continue to file this data, on an annual basis in the ARMIS format.[479] We will use the resulting information to monitor network investment and development.

353. Centel notes that LECs are at different starting points with respect to infrastructure development going into price cap regulation, and suggests that in order to stimulate investment the Commission should establish a price cap index that includes some sort of quality factor.[480] Others urge that the Commission must somehow ensure that the network infrastructure is not only maintained, but advanced -- that the network is upgraded, and that new technologies are introduced.[481] We are persuaded that no additional action by the Commission is necessary now in this regard. As we have discussed, despite the fact that incentives to maintain service quality and develop the network are an integral part of the price cap program, we are implementing expanded service quality and infrastructure monitoring programs to ensure that the current high standards are maintained and improved. But additional infrastructure incentives here seem unnecessary. Under price caps, a LEC's profits will depend upon how well it plans and operates its network to serve its customers' needs. Whenever infrastructure programs help achieve these goals, the price cap plan will encourage LECs to pursue them.

354. One commenter states that deployment of a modern infrastructure capable of delivering advanced services throughout the nation will require that LECs invest heavily and soon in many activities that do not have immediate market potential.[482] We are confident that, under price caps, the LECs will have sufficient incentives to expand network investment in advance of demand. We agree that society will realize the greatest value from the telecommunications network when communications and information services are made available to all customers. We believe that price cap regulation will advance this goal.

355. We rely also on the ability of price cap regulation to supplement and in effect replicate many of the effects of competition, to encourage price cap LECs to make economic decisions such as they would make in a fully competitive market. Further, where access competition has begun to emerge, LECs have rapidly upgraded their networks and implemented advanced technologies. At present, alternative access vendors are active in many areas; private networks can bypass LEC services; interexchange carriers can construct their own facilities farther into the local network. In such a market-place, where alternatives exist, if LECs fail to provide good service quality and invest in advanced technology to keep their network at the technological forefront, the market will punish them through a loss of demand. We will continue to support the development of competition; through the implementation of price cap regulation, we intend to provide LECs with the opportunity to continue their efforts to modernize the communications infrastructure and to maintain a level of investment which will lead to the implementation of an intelligent, interconnectable, broadband public network.

3. Other reporting

356. In addition to the monitoring mechanisms just discussed, other indicators of service quality are available. As noted in the *Second Further Notice*, we depend on tariff filings, ARMIS reports, and the complaint process, as well as on the monitoring programs specifically designed to show service quality and infrastructure development. LEC tariff filings contain cross references to Bell Technical Publications which define technical parameters of service provision.[483] We are not streamlining our review of proposed revisions to tariff terms and conditions, including terms and conditions relating to quality standards. Therefore, any attempts to revise tariffs that result in a downgrading of service quality remain subject to a minimum of 45 days' notice and the possibility of rejection or suspension and investigation to determine their lawfulness. Since parameters of service quality are contained in LEC tariffs, changes in these parameters would have to be made in the context of public, non-streamlined tariff proceedings, subject to full scrutiny and procedure.

357. ARMIS, the Automated Reporting Management Information System, is a system of automated reporting requirements that requires Tier 1 LECs to report data by study area and by state and interstate jurisdiction.[484] While these reports are not specifically designed to reflect service quality, some information collected here can indicate trends. For example, information on plant in service is a good indicator of investment in service quality; TPIS (total plant in service) is included in both the quarterly and the annual reports, while the annual ARMIS USOA report includes gross plant additions.[485] And, as discussed above, the ARMIS quarterly report will now include price cap LECs' service quality reports, as discussed above. Finally, the complaint process both provides a forum for the resolution of particular service quality complaints, and serves as a warning system of service quality deterioration.[486]

4. Other quality monitoring issues

358. In earlier parts of this proceeding, the Commission solicited comments on the need for, and desirability of, uniform national standards for service quality; the Notices mentioned specifically the NARUC model standards, and asked for other suggestions as well. The topic drew much comment, but no consensus.[487] Nowhere in the record is there any indication that service quality is at present unacceptable or problematic. Neither is there any indication that the states are ineffective at monitoring and regulating service quality, to the detriment of interstate service. On the current record, and given the expanded monitoring program we are adopting, we believe that it is unnecessary, and would be quite difficult, to establish detailed, universal standards for service quality, and the monitoring and enforcement sequentiae they would demand. Further, the development of such standards might well impinge upon the states' efforts in that area. We do, however, stand ready to impose such standards if our monitoring indicates that is necessary.

359. In earlier rounds of this proceeding, the issue of the aggregation of data has arisen. The primary question, which the Commission explored in the *Second Further Notice*, concerns the reporting of service quality indicators on a study area or more aggregated basis. Some commenters argue that the RBOC semi-annual reports are on such a highly aggregated basis as to be useless.[488] Some commenters argue that even study area-level reporting is too aggregated, since it allows averaging over a large enough area so that service quality degradation in a locality can go unnoticed.[489] Some commenters suggest service quality reporting and monitoring at the LATA level.[490] One commenter says that the Commission, even if it did decide to collect data on a less aggregated basis, is unwilling or unable to review and evaluate the more detailed data.[491] Most commenters, however, do not oppose the level of geographic aggregation we propose -- the study area -- and we are not convinced that the level of aggregation should be changed.[492] We believe that reports based on study area data are specific enough to allow adequate monitoring of LEC performance, especially in conjunction with the other service quality safeguards discussed here.[493]

360. A second aggregation issue concerns the service level of reporting. Commenters suggest that the service quality reports would be more useful if they were disaggregated by type of access (special or switched).[494] We agree. Switched access customers may have different expectations and concerns regarding service quality than those held by special access customers. Further, a LEC's attention to service quality and response time may vary depending upon whether other alternatives are available to the customer. It seems possible, for example, that a LEC might respond more quickly to a special access customer's service call, given the availability of alternatives, than to a switched access customer's request for repair. Service quality reporting that fails to distinguish between special and switched would allow this difference in response time to go unnoticed. It is not clear from the

record before us, however, what the burdens of reporting switched access and special access service quality will be. While we believe that this segregation is important, we will not impose reporting burdens that outweigh the benefits. We accordingly direct the Common Carrier Bureau to determine, in the course of its development of reporting requirements, the extent to which separate switched access and special access reporting is reasonable, and to require this segregation to that extent.[495] We believe that the level of service aggregation established here appropriately balances the concerns of both LECs and customers.

361. The third aggregation issue concerns the use of state reports for federal service quality reporting. Some commenters suggest that the service quality reports filed with this Commission would be more useful if they used the same formats or criteria as service quality reports required by the states.[496] It is clear, however, that there is no uniformity among the states in this regard. We believe it is more important to have uniform and complete reporting on a federal level, in a format designed to provide comparability and usefulness of data while minimizing the burden on price cap LECs, than to attempt at this time to develop a format that reflects the various state formats and criteria. We also reject any suggestion that we should merely accept from each LEC a copy of whatever service quality report it files with the relevant state commission, since it is our purpose here to provide a uniform, usable, automated data collection.

362. Another issue raised by commenters concerns the need for service quality enforcement mechanisms. Many of the commenters' suggestions regarding enforcement hinge on our development of specific service quality standards; our decision not to adopt federal standards moots these suggestions.[497] Some commenters suggest that the Commission should consider including an incentive plan for service quality regulation, arguing that after-the-fact responses to service quality degradation do not adequately address the problem.[498] We do not believe that additional incentives are needed to ensure that LECs will maintain service quality. The economic incentives included in the price cap plan, combined with service quality monitoring programs, should be adequate to maintain and improve service quality.

363. Several commenters urge that service quality can be assured through its inclusion in a sharing plan such as has been implemented in some of the states.[499] These commenters argue that LECs should be required to invest a portion of any increased earnings in network improvements. Centel urges that any sharing mechanism should encourage infrastructure development, and should recognize price and technology differences among LECs. We are familiar with the sharing plans developed in some of the states, which direct a LEC to invest in its network a percentage of its earnings above a particular level. While we believe the state commissions' development of such programs is commendable, we do not believe that such sharing arrangements are necessary or desirable on a federal level. First, this Commission is in a very different position relative to the LECs than are the state commissions.[500] Further, it would be difficult for this Commission to establish guidelines regarding required or desirable amounts and purposes of LEC investment in the network. Moreover, such federal guidelines might conflict with state programs, or might fail to select the best economic approach to meeting specific local needs. These programs would also reduce one of the benefits of price caps to customers -- *i.e.*, lower rates. Finally, we are persuaded that no such requirement is necessary on a federal level because poor service quality carries its own penalties for the LECs.

364. Our decision to make price caps mandatory for only the eight largest LECs moots the assertion by several commenters that only larger LECs (in the proposal made in the *Second Further Notice*, the Tier 1 LECs) should be required to file the proposed service quality reports on a quarterly basis.[501] Since we are not imposing the price cap plan on any smaller LECs, but are allowing them to elect it, we find that it would be inappropriate and unjustified to establish a different monitoring standard for them than for other LECs under price caps.[502] While we are aware that the reporting requirements discussed here might be more difficult for a small LEC to meet than for a large LEC, we are convinced that this service quality data is necessary and useful. As noted above, service quality reporting requirements will be just one of the factors considered by a LEC that is contemplating electing price cap regulation.

B. Jurisdictional cost shifting

365. Some commenters express concern that adoption of price cap rather than rate of return regulation at the federal, interstate level would cause LECs to attempt to shift costs improperly to state jurisdictions that continue to use rate of return regulation as the basis for setting intrastate rates. We believe, as noted in the *Second Further Notice*, that our price cap plan offers strong assurances that such misallocations will not occur, or in any case could be readily identified and corrected. One effective safeguard against any misallocation between state and interstate jurisdictions is our use of the ARMIS reports. ARMIS collects data both quarterly and annually, has been in existence for more than two years, and provides financial and operating data on a study area level that allows us and other interested parties to monitor LEC allocations for consistency within each filing and consistency over time. Further, the Commission's separations rules and the states' monitoring programs also act as constraints on LECs' jurisdictional misallocation. Finally, the pace of regulatory reform at the state level is accelerating, and as more states move toward price cap or incentive regulation, any LEC incentives to attempt to shift costs decrease.

366. LECs may have some incentive to attempt to manipulate jurisdictional cost allocations whenever they face different state and federal regimes.[503] Under our price cap plan, however, we are including mechanisms to ensure that any such misallocation will be readily identified and corrected, and we are making our data compilations available to the states. The separations rules, Part 36 of the Commission's rules, 47 C.F.R. Part 36, remain unchanged as we implement price caps. These rules, revised in 1987,[504] govern the allocation of costs between the interstate and intrastate jurisdictions.[505] The procedures established in Part 36 are applicable to the allocation of property costs, revenues, expenses, taxes, and reserves between state and federal jurisdictions.[506] The separated results are identified by property accounts, and apportionment bases are provided for those expenses which are separated on the basis of the apportionment of property costs.[507] Both the FCC and the state commissions monitor the LECs' application of these rules.

367. ARMIS is a system of automated reporting requirements that requires all Tier 1 LECs to report data by state and interstate jurisdiction, and will continue to allow the Commission to track cost allocations over time.[508] Because ARMIS will have been in place for more than two years prior to the implementation of price caps for LECs, interested parties, including the Commission, will be able to compare pre- and post-price cap data, and to spot trends (or departures from trends) with ease. In addition to other reports,[509] the ARMIS annual filing includes a study area report containing jurisdictional separations and interstate access results for each category specified in Parts 36 and 69 of the Commission's rules.[510] Many of the allocation factors tracked by ARMIS are demand-driven; the allocation results we monitor will permit us to detect abnormal trends in cost allocation results. State regulators and the Commission can thus determine whether investigation or auditing is required. We are persuaded that the data collected in the ARMIS format is inclusive and detailed enough to be very useful in the oversight and monitoring process discussed here.

368. We disagree with the arguments of Maryland PC that the confidential treatment of data submitted in the ARMIS reports will significantly detract from the usefulness of that data,[511] and with various LEC arguments that ARMIS data must be treated confidentially. We believe that a balance exists in which LEC proprietary interests are protected,[512] yet enough data is available to the public to allow thorough monitoring. In two recent actions, for example, the Common Carrier Bureau determined that the vast majority of data submitted in ARMIS quarterly reports does not qualify for confidential treatment under the Freedom of Information Act or our rules. [513]

369. State monitoring will also discourage and detect LEC misallocations from interstate to intrastate. Several state commissions commented in earlier stages of this proceeding, urging that their monitoring efforts depended upon our retaining the ARMIS system and making it available to them.[514] It is in the interests of the state commissions to ensure that LEC cost allocations are accurate, and it is clear from this record and from our discussions with state commissions that the states are eager and capable monitors. We have established, and here affirm, a policy of cooperation with the state commissions, including and attested to by the ready availability of ARMIS data.

370. Finally, as more and more states adopt incentive regulation, the LECs have less and less incentive to attempt to shift costs. If neither the state nor the federal regulator is regulating LEC rates based on a rate of return method, and both are regulating based on capped prices or other incentive plans such as rate freezes, the allocation of costs (and, specifically, their assignment to the state rather than the interstate jurisdiction) is no longer determinative of rates. Thus, as more and more states adopt regulatory methods that focus on prices rather than costs, LECs have even less to gain by trying to shift costs to the intrastate jurisdiction.

371. Many state commissions have undertaken regulatory reforms that are in some ways like our price cap plan; more than twenty states have developed some form of incentive regulation, focusing on rates rather than (or in addition to) earnings, and often including a sharing mechanism.[515] In fact, only a few states -- Delaware, Hawaii, Tennessee, and Wyoming -- continue to regulate LECs completely traditionally. As long as these state systems are not identical to the federal plan, some incentive to attempt to shift costs will exist. We are persuaded, however, that the combination of state regulatory reform and the other safeguards discussed here will effectively curb any jurisdictional misallocations.

C. Other monitoring and performance review

1. Monitoring of costs, demand, and earnings performance[516]

372. We recognize that in launching an entirely new system of regulation of local exchange carriers, we have a responsibility not only to shape the plan as carefully and knowledgeably as we can, but also to monitor its application and results, to guard against unintended, unanticipated effects or problems. We also need to consider the information that would help us prepare for the performance review of the price cap program, which we have proposed to begin after no more than three years and complete by the fourth year of the plan. We have reviewed our monitoring and data collection capabilities and requirements, based upon the comments and record developed in this proceeding, to ensure that they provide information that is accurate and sufficient to this task. In some areas (*e.g.*, service quality and infrastructure) we are expanding the LECs' obligation to collect and report the necessary data.

373. In the area of LEC costs, jurisdictional separations, usage, and earnings data, we currently monitor LEC performance using two reporting systems. The computerized ARMIS data base includes six reports of a wide range of operating information. Form 492 provides data focused primarily on the LEC's quarterly revenues and earnings. Based on our review of these reports and their contribution to price cap regulation, we conclude that these reports will adequately provide the information we will need to monitor price cap LECs. We generally deny requests by LECs that we reduce the amount of data they currently must file. The one exception is that we will not require price cap LECs to file disaggregated rate of return data that is not useful under price caps. Conversely, we deny requests by other commenters that we extend the application of ARMIS to smaller, Tier 2 LECs.

a. Use of ARMIS

374. LEC commenters agree that the data we currently collect using ARMIS is sufficient to monitor LEC performance under price caps.[517] Only two commenters oppose this conclusion; they assert that ARMIS is too vague, [518] provides no performance standards,[519] is untested,[520] and is not readily available to the public.[521] They also argue that price cap regulation places additional demands on existing and planned monitoring systems.[522] We have reviewed these comments and believe these concerns are unfounded or represent a misunderstanding of the philosophy of price cap regulation.

375. ARMIS provides us with a consistent set of data for more than two years immediately preceding price cap regulation, and will continue to do so during the initiation of the price cap plan and throughout the initial four-year period of price caps. ARMIS reports include information on revenues, expenses, investment, taxes, and earnings, as well as demand data.[523] ARMIS includes one quarterly report that contains in summary form the data needed to monitor revenue requirements, rate of return, jurisdictional separations, and access charges.[524] ARMIS

also contains annual reports including the USOA report,[525] the joint cost report,[526] and the access report,[527] as well as three-year investment usage forecasts and actuals reports. The LECs also file their Tariff Review Plans (TRPs) in ARMIS. These reports will permit us to monitor a variety of LEC activities, including cost allocations between regulated and nonregulated activities and allocations between the state and interstate jurisdictions.

(1) Modify ARMIS for Tier 1 LECs

376. Several LECs request that ARMIS data be required only at the aggregated, total interstate level, not at the current, disaggregated level of Part 69 rate elements.[528] They state that the more detailed information is unnecessary for price cap regulation,[529] and argue that rate level calculations based on rate of return are inappropriate in a price cap environment,[530] and will effectively stifle the incentives we seek to establish.[531]

377. We presently collect data on a Part 69 rate element level, and we believe it is desirable, if not essential, for purposes of monitoring and evaluation, to continue to collect most data on this level, which corresponds generally to the level of services that customers actually use. As with any consideration of increased aggregation, we are concerned with the potential loss of precision. For example, undesirable state-interstate shifting would be more difficult to detect if data were more highly aggregated. An error that is readily detectable at a high level of detail may be masked when the level of detail is decreased. The phasing-in of dial equipment minute (DEM) measurements, for example, can be monitored if we retain current data collection requirements; these changes would be obscured if the data were more aggregated. Our intention is to assure that jurisdictional separations and regulated-nonregulated allocations are made correctly; in order to assure this, we need to maintain the same levels of aggregation of data as are established in Part 69 and the Separations Manual.

378. ARMIS data serves more and broader purposes than merely the regulation and enforcement of rate of return. While ARMIS includes some data not directly necessary to price cap regulation, such as revenue and expense data on a rate element level, we believe that removing these parts of the ARMIS format would detract from the usefulness, consistency, and reliability of the system as a whole, both historically and on a single-filing basis. As discussed below, we believe it is inappropriate to collect price cap LECs' rate of return data on this level; but deletion from ARMIS of all category-level data would remove much that is useful, and would considerably reduce the Commission's ability to monitor LEC performance in a meaningful way.

379. We have accordingly concluded that we should retain the ARMIS data requirements at their present level of detail. These reports will allow us to monitor LEC performance carefully in the initial years of the price cap program and for the scheduled review. This monitoring will also allow us to assure that cost allocations between regulated and nonregulated activities and allocations between the state and interstate jurisdictions are correctly calculated. We therefore reject the suggestions to modify ARMIS substantially.[532]

380. We do agree in part, however, with the suggestions of commenters who assert that the collection of rate of return data on an access category or rate element level is improper and unnecessary for price cap LECs.[533] While we believe that cost, revenue, and demand data are essential to monitor LEC performance under price caps, we see no need for disaggregated rate of return data. Our sharing and adjustment mechanisms are based on total interstate rate of return, and that is the only earnings data used in the price caps plan. We accordingly determine that we should remove from ARMIS, for LECs under the price cap plan, any rate of return reporting that requires data at less aggregated levels than total interstate earnings. We will also modify the tariff review plans (TRPs) of price cap LECs to the same effect. While we continue to collect other data from price cap LECs on a disaggregated basis, this collection is solely for monitoring purposes. This disaggregated data does not serve a ratemaking purpose for these carriers, nor is there any reason to expect that results under price caps will correspond to data from previous years. We have modified our Part 69 rules to reflect this expectation that our collection of disaggregated data from price cap LECs is for monitoring purposes only.[534] We delegate to the Chief, Common Carrier Bureau the task of effecting these modifications to the ARMIS reporting requirements for price cap LECs.[535]

(2) Modify ARMIS for small LECs

381. All Tier 1 LECs are already subject to ARMIS filing requirements, and so face no additional burdens (except for the service quality and network investment indicators, newly required of all price cap carriers) under price cap regulation. But in response to the suggestion in the *Second Further Notice* that we might develop ARMIS reports for Tier 2 LECs,[536] some commenters argue that small LECs should be able to elect price caps without being subjected to ARMIS reporting requirements.[537] Tier 2 LECs have always been exempted from these requirements, these parties argue, in acknowledgment of their limited data collecting capabilities; these capabilities will not change or expand when a Tier 2 LEC elects price caps.[538]

382. In establishing the ARMIS system in 1987, the Commission decided that the reporting requirements would apply only to Tier 1 LECs.[539] Although the Commission had proposed in its notice of proposed Rule Making that the ARMIS requirements apply also to Class A carriers with revenues over $50 million, LEC commenters urged the raising of the threshold to $100 million in view of the difficulty that smaller carriers would have meeting the automating and reporting standards. The Commission complied, and stated that filing requirements for Tier 2 carriers with revenues over $50 million would not be specified in the ARMIS proceeding. The Commission has historically been sensitive to the difficulties faced by smaller LECs in providing cost, demand, and revenue data.[540]

383. We are not persuaded that the implementation of price caps requires that we abandon this sensitivity to small carriers' concerns. We note an added difficulty in extending ARMIS reporting requirements to Tier 2 LECs; some of these LECs are not subject to Part 32 or USOA requirements. Since these requirements are a major underpinning of the ARMIS reporting format, applying ARMIS requirements to these LECs would mean either making them subject to Part 32/USOA, or receiving ARMIS reports with inconsistent and possibly incompatible data. Neither of these seems to us an acceptable outcome, and we are not convinced that ARMIS should be required of Tier 2 LECs. Further, we believe that

existing Tier 2 reporting provides us with sufficient information to allow the operation of the backstop mechanisms established here. We believe that in monitoring the RBOCs and GTOC, and any Tier 1 LECs that elect price cap regulation, we will be assuring a broad and accurate overview of the price cap program. If Tier 2 LECs elect price cap regulation, and should interested parties experience difficulties and make a convincing case that the issue should be considered again, we can and will reexamine this issue.

b. Form 492

384. Form 492 reports are filed and reviewed on a quarterly basis. Form 492 is a collection of rate of return data that is required of each LEC that files an individual access tariff;[541] it is reviewed and analyzed by the Industry Analysis Division (IAD). As we have discussed, rate of return information is useful under price caps in monitoring and applying sharing and the adjustment mechanism,[542] but only at the total interstate level. Consistent with our determinations regarding rate element or category rate of return information in the ARMIS reports, we also direct the Common Carrier Bureau to eliminate unnecessary, disaggregated rate of return data from the Form 492.[543]

2. Performance review

a. Timing of review and adjustments

385. The performance review scheduled to begin after three years of price cap regulation for LECs, and to be completed within a year, is calculated to evaluate the system as implemented, and LEC performance under it. The transition from rate of return to price cap regulation is a complex one, and, while we have made every effort to consider each relevant factor carefully and to base our determinations in reason and experience, some fine-tuning will probably prove necessary. Our performance review will provide indications of how this is to occur. The *Second Further Notice* stated that we will evaluate LEC performance comprehensively, and will include in our review LEC prices, earnings, service quality, and technological progressiveness. The inclusion of such factors indicates our awareness that new performance measures will not be needed. We believe that price cap regulation will produce superior productivity and innovation, and it is important to design a performance review that will identify such gains.

386. To provide a fair evaluation of the program, it is also important that the initial period before periodic review and the possibility of major adjustments be long enough for incentives to operate. We believe that a four-year period without major adjustment (to, for example, the productivity factor) is reasonable. The real test of any such program is experience. Failure to provide a reasonable period of acclimation could result in regulatory ambiguity, and resulting uncertainty, that would effectively stifle the intended incentives.

387. Some commenters argue that the initial period is too long, and that LEC performance should be reviewed, and adjustments made, earlier.[544] They assert that the Commission must, at a minimum, express willingness to review before the end of four years, if it appears that rates (especially for small and rural or isolated areas) are too high, that service quality is declining, or that there is any indication that price cap regulation is not fully effective.[545] Most LECs, however, urge us to maintain the proposed schedule, and to decline to engage in interim or shorter term reviews.[546] They urge, also, that no adjustments should be made until the end of the four year period, and that only if this is assured will the incentives operate effectively.

388. We continue to be persuaded that the review period must be long enough to allow the effects of incentive regulation to unfold before a scheduled evaluation. We will plan to begin our review only at the end of the third year of price cap regulation, and conclude it by the end of the fourth year. We will, however, monitor LEC performance throughout, for indications such as great disparity in rates, declines in service quality, or other signs of system failure that indicate a need for intervention. This Order also serves notice that should these signs of system failure, or other substantial indicators of unacceptable performance, be exhibited, we will accelerate our performance review, and we will make adjustments and corrections as needed. Absent such problems, however, we intend to make no major, systemic adjustments until conclusion of the scheduled review.

b. Focus of review

389. The Commission has stated its intention to consider price, quality of service, earnings, and technological progressiveness in the review of LEC performance under price caps. In prior sections on service quality and infrastructure development, we have indicated the parameters of our reporting requirements, and thereby outlined at least some of the factors our performance review will consider. We have also indicated our reliance on ARMIS reporting, which provides revenues, expenses, investment, taxes, and total interstate earnings, plus demand data, and will help us compare LECs' performance under caps with their performance under rate of return regulation and to benchmark each LEC's performance to that of others.

390. Several LEC commenters have requested specifics on the criteria we will use in our review; they suggest we establish a standardized format for the review, and an opportunity and format for comments.[547] They argue that if these criteria are not specified and fixed before the initiation of price caps, the resulting uncertainty will thwart the incentives price caps is meant to engender.[548] Other LECs, however, argue that no set criteria should be established, but that each LEC should be reviewed on an *ad hoc* basis.[549]

391. Our stated intention to review "technological progressiveness" stimulated much discussion. Some LECs argue that, because of long lead times, the influence of regional economics, and differences in state regulation, it will be impossible for the Commission to perceive and measure technological progressiveness, let alone to attribute any positive growth to price cap regulation.[550] Some LECs offer suggestions of how they will demonstrate real price decreases, efficiency improvements, increased service quality, and new and innovative services,[551] proposing that measurement of fiber optic use, access to ISDN, growth in network transport, percentage of stored program control switches, and percentages of digital interoffice facilities and digital switching can provide indications of technological progressiveness.[552]

392. We believe that the added data collection requirements set forth in our discussion of infrastructure, *supra*, will provide us with at least a framework upon which to base a review of technological progressiveness. Many of

the standards suggested by the LECs in comments are included in that ARMIS addition, including central offices categorized by type of equipment (SPC, digital, equal access, SS7, ISDN), and local loop and interoffice transmission facilities by type of available channel, among other things. Further, the BOCs and GTOC have already submitted two years of historical data in that format, so we will be able to see trends extending from rate of return into price caps, rather than just numbers from price cap experience. At the time we initiate performance review, we will also consider whether other indicators of technological progressiveness may be valuable.

393. We have not established, and do not intend to establish at this time, any specific standards or remedies, or even any specific expectations. We intend to use all available data and information in our performance reviews, and we believe that the reporting requirements established here will provide a good starting point. We are not persuaded by the LECs' arguments that our failure to specify now the criteria on which they will be reviewed in four years can result in the dissipation of the incentives provided by price cap regulation. Our review will be fair and comprehensive, and will consider the main areas outlined above. Our focus will be on the extent to which individual LECs and the industry as a whole have better met customer needs, at reasonable rates. At the appropriate time, we will establish a format for the review, and an opportunity for comment.

c. Adjustments based on review

394. The results of the performance review will enable us to revisit, with experience, some of the issues raised here, but, contrary to the assertions of some commenters, its effectiveness does not depend on the existence of specific standards and remedies.[553] The performance review should provide sufficient information to allow the Commission to reevaluate the need for lower end adjustment and sharing mechanisms, and to adjust the sharing mechanism and productivity factor if necessary.[554] At that time we will evaluate all aspects of the price cap plan and of LEC performance. Our objective will be to ensure that we are providing strong incentives to carriers to provide a rich variety of services, and a substantial benefit to customers. We hope to see that carrier productivity and innovativeness are increasing, while rates paid by subscribers are decreasing. The results of the performance review will help us evaluate and adjust any appropriate aspect of the price cap plan to better achieve those goals.

IV. EFFECT OF PRICE CAP REGULATION ON OTHER FCC REGULATION

A. Open Network Architecture

395. In response to the *Second Further Notice*, parties have raised a variety of issues related to the treatment of Open Network Architecture (ONA) services under price cap regulation.[555] We conclude that ONA services, and other services that require fundamental changes in the structure of our access charge rules, raise pricing issues that can best be resolved in other proceedings.[556] We therefore defer decisions related to the pricing of ONA services to the *ONA Part 69* proceeding. [557] We anticipate, for example, that the *ONA Part 69* proceeding will establish rules for setting initial rates for ONA services, as well as future price cap treatment of these services. Pricing issues related to other services that require fundamental changes in the access charge structure will be resolved in appropriate proceedings as they arise.

B. Other regulations

396. In both the *Further Notice* and the *Second Further Notice*, the Commission stated that it intends to retain existing policies and rules in several areas that foster competition and prevent discrimination in the provision of telecommunications services.[558] These areas include: (1) existing market and accounting rules, including open entry, equal access, resale and shared use, interconnection, unbundling of tariffed services, and non-structural safeguards where LECs provide enhanced services, as well as the separations rules, the joint cost rules, and the USOA; (2) existing complaint procedures; and (3) rules concerning the extension of lines and discontinuation of service. We find that the implementation of price cap regulation for the LECs will be enhanced by the continuation of these rules and policies, and that such retention will ensure that our implementation of price cap regulation for interstate access services and interexchange services does not disrupt either our continuing regulation of other interstate services or state regulatory systems.

397. In response to the *Second Further Notice*, several parties support the Commission's tentative decision to retain those market and accounting rules.[559] The Arkansas PSC, however, contends that the Separations Manual, the USOA, and the joint cost rules were designed for rate of return regulation and are not applicable to price cap regulation.[560] While this Commission recognizes that most of these rules were designed for use with rate of return regulation, we do not find them incompatible with price cap regulation of the largest LECs and those who voluntarily elect to participate. On the contrary, we find that those rules will continue to serve a number of important purposes as more and more LECs participate in price cap regulation but many remain subject to rate of return regulation.

398. We also retain existing complaint procedures because such procedures represent an important adjunct to our ability to monitor compliance with our rules by LECs subject to price cap regulation as well as those LECs that remain subject to rate of return regulation. Complaints under Section 208 will continue to assist us in determining whether LECs have complied with the price cap rules as well as with other provisions of the Act.[561] While we recognize the concerns of some that there have in the past been delays in the complaint process,[562] we note that prompt disposition of many complaints will be assured by the recent adoption of legislation requiring the resolution of many complaints within one year, or, in certain cases, 15 months.[563] Nothing in this proceeding requires adjustment of the standards or burdens associated with the complaint process, and we accordingly reject requests for changes in those areas.[564]

399. We have also decided not to modify at this time the Part 63 rules which enable us to monitor carrier network and service operations. We find that these rules will continue to provide us with an additional means of safeguarding the public interest, and we have found no evidence that the current approach is burdensome.

400. In response to the *Second Further Notice*, two LECs questioned our proposed treatment under Part 65 of any refund obligations price cap LECs may incur during their last rate of return enforcement period.[565] We reject Bell

Atlantic's suggestion that we defer consideration of this rule to our pending Part 65 proceeding. The termination of rate of return regulation for price cap carriers requires that we make provision for possible overearnings in the final enforcement period leading to price cap regulation. We also reject US West's suggestion regarding cash refunds because we believe that prospective PCI adjustments are simpler for us to monitor, easier for the affected LECs to implement, and considerably limit the potential for discrimination among ratepayers.[566] In addition, we reject the suggestion of US West that this Commission lacks authority to order refunds except where a carrier has proposed a rate increase and an accounting order has been entered.[567] We wish to make clear, as we have in earlier proceedings, that our refund authority under Section 204 is not limited to such cases,[568] and that our refund authority extends beyond Section 204.[569]

V. LEGAL AUTHORITY

401. In adopting price cap regulation for AT&T, the Commission explained in detail the legal basis for its action.[570] We concluded, *inter alia*, that: (1) substitution of price cap regulation for traditional rate of return regulation was within our authority under the Communications Act; (2) price cap regulation would comply with the Act's requirement that rates be just, reasonable, and non-discriminatory; (3) our no-suspension zone approach to price cap regulation was consistent with the Act and relevant judicial authority; (4) a rate prescription was not required in connection with our use of existing rates; and (5) a *de facto* rate prescription had not been undertaken in connection with or no suspension zone approach to price caps. Consistent with our tentative conclusion in the *Second Further Notice* that price cap regulation of local exchange carriers is lawful,[571] we conclude, for the reasons set forth there and supplemented below, that the LEC price cap plan adopted today is within our legal authority under the Act, and that it will assure that LEC interstate rates remain just, reasonable, and non-discriminatory.

402. The primary basis for this conclusion is that our price cap plan for the LECs largely tracks our AT&T price cap plan. Both plans feature a streamlined tariff review process with suspension and no-suspension zones, baskets, service categories, and bands to guard against precipitous price changes for particular services, as well as a price cap formula that is based on existing rates,[572] reflects cost changes and includes a Consumer Productivity Dividend that requires carriers to increase their productivity above historical levels to take advantage of the increased flexibility provided by the price cap system. Several parties repeat legal arguments previously rejected in the context of the AT&T plan, but they do not explain why our legal conclusions in that context were wrong or are not directly applicable to price caps for LECs.[573] Accordingly, we again reject those arguments for the reasons set forth in the *AT&T Price Cap Order*.

403. Compared with the price cap plan we adopted for AT&T, we have added one additional safeguard to our LEC plan to respond to the concern that, as discussed previously,[574] we may not be able to select a productivity figure for the LECs in which we have precisely the same high degree of confidence as we have in the productivity figure chosen for AT&T. As a result of this concern, there is some risk that relying solely on the approach taken in the AT&T plan could result in a particular LEC earning increased profits that are not necessarily tied to increases in productivity. Accordingly, we have adopted a sharing mechanism, described in detail above, for carriers that comply with price cap ceilings.[575] By setting an upper limit on LEC profits and adding an additional mechanism to ensure that ratepayers directly benefit from any increases in profits,[576] we are further ensuring that LEC rates will remain within a zone of reasonableness.

404. We adopt the sharing mechanism pursuant to our general Rule Making authority contained in Sections 4(i) and 201-203 of the Act as well as our prescription authority contained in Section 205 of the Act.[577] In addition to the sharing mechanism, and under the same authority, we have included in our LEC price cap plan a lower end adjustment mechanism consistent with our obligation to ensure that LEC rates are not confiscatory.[578]

405. We disagree with those who argue that our price cap plan fails to assure just and reasonable rates because it does not adequately take carrier costs and profits into account.[579] As we have explained, price cap rates do reflect costs and take profits into account, albeit in a different manner than do rate of return rates.[580] Our decision to modify the manner in which we take costs and profits into account is based on our analysis that the price cap cost benchmark will produce efficiencies unattainable in the prior regulatory system, and is fully supported by relevant precedent.[581] Furthermore, the relative absence of competition compared to the interexchange market is not a legal basis to block price cap reform for LECs, as some have claimed.[582] Price cap regulation for AT&T was not predicated on the existence of competition, and nothing in the design of LEC price cap regulation is predicated on the existence of competition for interstate access services. In fact, the absence of competition is one reason we decided to employ the backstop of a sharing mechanism to prevent even the possibility of excessive monopoly earnings.[583]

406. With respect to costs and profits, we will continue to rely, as we do with AT&T, on the Section 204 investigation and Section 208 complaint processes as part of our plan to ensure just, reasonable, and non-discriminatory rates.[584] In light of our selection of the sharing and adjustment mechanisms, complaints claiming that overall company earnings that comply with the sharing mechanism are excessive in view of costs will not lie. Since our sharing mechanism does not relate to specific rates, however, complaints that particular rates are unjust and unreasonable in light of the relevant costs and profits, or that they are discriminatory, may continue to be filed. In addition, if a LEC does not appear to be in compliance with the sharing mechanism, its tariffs would be subject to investigation and suspension pending an inquiry into the extent to which its price cap indexes had been sufficiently reduced to properly account for its historical earnings. Complaints could also be filed in this case. Similarly, if a LEC has been permitted to charge above-cap rates, the sharing mechanisms would no longer apply, and the LEC's rates would be subject to complaint on the basis that they are unjust and unreasonable in light of the current rate of return prescription. Thus, our investigation and complaint processes will remain important tools in ensuring just, reasonable, and non-discriminatory rates, and in monitoring carrier costs and profits.

VI. PAPERWORK REDUCTION ACT ANALYSIS

407. On May 11, 1989, after the release of the *Second Further Notice* in this proceeding, the Commission requested that the Office of Management and Budget (OMB) review the proposed information collection requirements for compliance with the Paperwork Reduction Act (PRA). On July 20, 1989, OMB approved the Commission's proposed information collection requirements contained in the *Second Further Notice* on LEC price cap regulations. The Report and Order adopted here contains final rules that modify the reporting requirements proposed in the *Second Further Notice* and approved by OMB.

408. This Order adopts incentive regulation for the LECs, and promulgates final rules to implement such regulation. In connection with this Report and Order, we renew our request for review of Paperwork Reduction Act requirements in light of the modifications here of proposals made in the *Second Further Notice* and the *Supplemental Notice*. The rules for LECs contained herein have been analyzed with respect to the Paperwork Reduction Act of 1980 and found generally to decrease the information collection burden on the public, although some new reporting requirements have been added.[585] This modification in the information collection burden is subject to approval by OMB as prescribed by the Paperwork Reduction Act.

409. As was done in the case of adopting final rules for AT&T, we identify those portions of this Further Notice that respond to the eight OMB concerns raised in response to our *Further Notice*. With respect to the LECs, our response to OMB's concerns can be found at: (1) need for a rate "floor" designating the bottom of the no-suspension zone -- pages 95, 135-137; (2) need to band rates by rate element -- pages 90-93; (3) need for 90-day review period for above-band rates -- pages 129-132; (4) need for identical tariff treatment of AT&T and LEC filings -- pages 124-144, (5) burdens of expanding service quality reporting from Tier 1 LECs to all price cap carriers -- pages 148-165; (6) election of price caps by LECs -- pages 111-117; (7) quantification of administrative savings and identification of changes in reporting requirements -- pages 20, 83, 124-144, 148-165;[586] and (8) impact on state regulators -- pages 20-24, 165-169.

VII. REGULATORY FLEXIBILITY ACT ANALYSIS

410. We certify that the Regulatory Flexibility Act[587] is not applicable to the rule changes we are proposing for the LECs in this proceeding. In accordance with the provisions of Section 605 of that Act, a copy of this certification will be sent to the Chief Counsel for Advocacy of the Small Business Administration at the time of publication of a summary of this Further Notice in the Federal Register.

411. As part of our analysis of the regulation adopted in this Report and Order, however, this Commission has considered the impact of the proposal on small telephone companies, *i.e.*, those serving 50,000 or fewer access lines. As a result of our decision to make price cap regulation elective for depooled cost companies other than the RBOCs and GTOC, no small carrier will be forced to change the method by which it is regulated. Small companies that currently file their own cost-based access tariffs are free to remain under rate of return if they decide that rate of return is better suited to their circumstances than is price caps. Small carriers participating in the NECA pools, and for whom NECA files access tariffs, will not be forced to leave the pools as a result of the price cap rules we are adopting in this Report and Order. In addition, nothing in the price cap program would discontinue or impair the variety of programs we have established to provide support to small carriers. These programs, such as our High Cost Fund and long term support mechanisms, continue intact. Furthermore, average schedule companies that are or become affiliated with cost companies that are regulated under price caps would not need to relinquish average schedule, rate of return regulation. We have also determined that, for companies that have not yet begun conversion to equal access, conversion costs be treated as exogenous costs under the price cap formula. This conclusion ensures that small carriers, who are the least likely to have begun equal access conversion, can flow through these costs to their rates should they elect price caps. These regulations, when viewed in their totality, permit small, depooled cost companies to take advantage of the benefits of price cap regulation at their option, while ensuring that the status quo is maintained for small carriers that do not participate in price cap regulation.[588]

412. Based on the foregoing analysis, we strongly disagree with Ronan's contention that we intend to discriminate against smaller carriers in this proceeding.[589] On the contrary, we have made a number of important accommodations to the interests of small carriers and, in a subsequent proceeding, will continue to explore ways to enable more small carriers to participate in the price cap program.

VIII. CONCLUSION AND ORDERING CLAUSES

413. The rules adopted here, establishing tariff filing requirements, the adjustment formulas, and other requirements for price cap regulation, will be effective October 31, 1990, in order to implement the November 1, 1990 filing date and January 1, 1991 tariff effective date. We find good cause to make these rules effective on less than 30 days' notice after publication in the Federal Register. *See* 5 U.S.C. § 553(b)(B). The January 1, 1991 tariff effective date will provide the earliest and fullest availability of the price cap plan's substantial benefits to the public. The tariff filing ordered here, like traditional tariff filings, relies on information that the carriers collect and compile on a quarterly and annual basis; the tariff year is July 1 to June 30.[590] Our selection of a January 1, 1991 effective date implements an initial half-year period of price cap regulation; this will allow the first full annual filing, to be made 90 days before July 1, 1991, to reflect some initial experience with price cap regulation and the modified filing requirements it establishes, and to apply the formula adjustments discussed herein. Further, the companies that the price cap rules will require to take action within less than 30 days from Federal Register publication have been actively involved in the development of these regulations, and are fully supportive of the initiation of price cap regulation as soon as possible.[591] We do not believe it would be appropriate to shorten the review period for this initial price cap filing. The public interest requires an adequate review period, to ensure that this Commission and interested parties can fully consider and evaluate these initial submissions of LECs participating in the price cap plan. The 60-day review period we

have established, from November 1, 1990, to January 1, 1991, is the minimum period necessary for this comprehensive review and evaluation.[592] Were we to establish an effective date later than October 31, 1990 for the rules defining the tariff filings, we would delay the effectiveness of price cap regulation, and its benefits for ratepayers, until at least July 1, 1991. This would also mean that the first price cap tariff filing would be a full annual filing, and that the application of the adjustment formulas, and the incentives they create, would be delayed for a full year after that filing, or until July 1, 1992.

414. Accordingly, IT IS ORDERED that, pursuant to Sections 4(i), 4(j), 201-205, 303(r), and 403 of the Communications Act of 1934, 47 U.S.C. §§ 154(i), 154(j), 201-205, 303(r), 403, and Section 553 of Title 5, United States Code, that Part 61, Part 65, Part 69, and Sections 61.3, 61.38, 61.39, 61.41, 61.42, 61.43, 61.44, 61.45, 61.46, 61.47, 61.48, 61.49, 61.58, 65.1, 65.600, 65.701, 65.703, 69.1, 69.3, 69.101, 69.105, 69.111, 69.113, 69.114, and 69.205, and 69.411 of this Commission's Rules, 47 C.F.R. Part 61, Part 65, and Part 69, §§ 61.3, 61.38, 61.39, 61.41, 61.42, 61.43, 61.44, 61.45, 61.46, 61.47, 61.48, 61.49, 61.58, 65.1, 65.600, 65.701, 65.703, 69.1, 69.3, 69.101, 69.105, 69.111, 69.113, 69.114, and 69.205, ARE AMENDED as set forth in Appendix B to this Order EFFECTIVE OCTOBER 31, 1990.

415. IT IS FURTHER ORDERED that authority is delegated to the Chief, Common Carrier Bureau, as specified herein, to effect the decisions set forth above.

416. IT IS FURTHER ORDERED that the Joint Motion for Tentative Decision filed by ADAPSO *et al.* IS DENIED.[593]

FEDERAL COMMUNICATIONS COMMISSION

Donna R. Searcy
Secretary

FOOTNOTES

[1] The Report and Order adopting price cap regulation for AT&T, and the *Second Further Notice* proposing price cap regulation of LECs was published as one document. When referring to the portion of the document containing the final order for AT&T price cap regulation, we will cite: *AT & T Price Cap Order*, 4 FCC Rcd 2873 (1989). When referring to the portions of the document addressing LEC price caps, we will cite: *Second Further Notice*, 4 FCC Rcd 2873 (1989).

[2] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Notice of Proposed Rule Making, 2 FCC Rcd 5208 (1987) (*Notice*) ; Further Notice of Proposed Rule Making, CC Docket No. 87-313, 3 FCC Rcd 3195 (1988) (*Further Notice)* ; Report and Order and Second Further Notice of Proposed Rule Making, CC Docket No. 87-313, 4 FCC Rcd 2873 (1989) (*AT & T Price Cap Order* or *Second Further Notice)* ; Supplemental Notice of Proposed Rule Making, CC Docket No. 87-313, 5 FCC Rcd at 2176 (1990) (*Supplemental Notice). See also* FCC Public Notice, Parties in Price Cap Proceeding Requested To File Draft Rules Implementing Proposed Price Cap Plans, 3 FCC Rcd 262 (Com.Car.Bur. 1988).

[3] The measure of inflation will be the same as in the AT&T price cap system, the Gross National Product Price Index.

[4] The seven corporations are: Ameritech Operating Companies (Ameritech), Bell Atlantic Telephone Companies (Bell Atlantic), BellSouth Corporation (BellSouth), New York Telephone Company and New England Telephone and Telegraph Company (NYNEX), Pacific Bell and Nevada Bell (Pactel), Southwestern Bell Telephone Company (SWB), and Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company (US West).

[5] Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, CC Docket No. 89-624, FCC 90-315, adopted September 19, 1990 (*Represcription Order).*

[6] Since LECs must share 50 percent of their regulated earnings between 12.25 percent and 16.25 percent, and return all earnings above 16.25 percent, LECs may keep only 14.25 percent once sharing is completed.

[7] In this case, LECs retain 50 percent of the earnings between 13.25 percent and 17.25 percent, for a total of 15.25 percent.

[8] In two of the baskets, we have decided not to use service categories. In the common line basket, prices for all the rate elements except for terminating carrier common line charges are for the most part controlled by existing Part 69 rules concerning subscriber line charges and the originating charge for carrier common line. Section 69.105 of the Commission's Rules, 47 C.F.R. § 69.105. Because LECs generally do not retain much discretion over the other rate elements in common line, the terminating carrier common line charge will either move with the price cap, or be priced below cap. In this circumstance no bands are required. In the interstate basket, we have decided not to impose additional service category requirements because interexchange services are a relatively small portion of LEC offerings.

[9] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, Memorandum Opinion and Order, 4 FCC Rcd 4797 (1988) (*Strategic Pricing Order)* ; *recon.* 5 FCC Rcd 4001 (1990) (*Strategic Pricing Reconsideration).*

[10] High capacity channels are defined according to capacity. A DS1 facility provides 1.544 Mbps of capacity and can be divided into 24 voice channels; a DS3 provides 44.736 Mbps and can be divided into 672 voice channels.

[11] *Second Further Notice*, 4 FCC Rcd at 2931 (para. 113).

[12] However, regulators can disallow costs so long as the total effect of a rate order is to impose rates within the zone of reasonableness. *Duquesne Light Co. v. Barasch*, 109 S.Ct. 609 (1989) (regulators can disallow a utility's proposed amortization of investment that never became used and useful).

[13] *Further Notice*, 3 FCC Rcd at 3222-23 (paras. 42-44).

[14] *Id.* at 2884-86 (paras. 19-25).

[15] American Tel. & Tel. Co., 9 FCC 2d 30 (1967) (prescribing a rate of return for the interstate operations of the Bell System). In 1969, the Commission initiated a proceeding to establish ratemaking principles for the Bell System. American Tel. & Tel. Co., 18 FCC 2d 761 (1969). That proceeding subsequently was included in an investigation of AT&T's rates. AT&T Long Lines Department, Revisions to Tariff F.C.C. No. 260, Private Line Services, Series 5000 (Telpak), Docket No. 18128, 61 FCC 2d 587 (1976), *recon.*, 64 FCC 2d 971 (1977), *further recon.*, 67 FCC 2d 1441 (1978), *aff'd in pertinent part sub nom. Aeronautical Radio v. FCC*, 642 F.2d 1221 (D.C. Cir. 1980) (*Telpak).* In *Telpak*, the Commission found that allocations based on historical cost causation were the best methodology to employ in evaluating AT&T's rates. Attempts to apply this methodology to Bell System rates were, however, unsuccessful. *See* AT&T, Manual and Procedures for Allocation of Costs, 84 FCC 2d 667 (1981) (set-

ting out an "interim" procedure for AT&T to develop its costs), *aff'd sub nom. MCI Telecommunications Corp. v. FCC*, 675 F.2d 408 (D.C. Cir. 1982). For AT&T, the interim cost allocation procedures remained in place until 1989, when they were dissolved upon the implementation of price cap regulation. Policy and Rules Concerning Rates for Dominant Carriers, 4 FCC Rcd 2873, 3136-37 (paras. 546-47) (1989).

[16] 47 C.F.R. Part 65. *See also* Refinement of Procedures and Methodologies for Represcribing Interstate Rates of Return for AT&T Communications and Local Exchange Carriers, 2 FCC Rcd 6491 (1987).

[17] Uniform System of Accounts for Telephone Companies, 60 RR 2d 1111 (1986), *recon.*, 2 FCC Rcd 1086 (1987); Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, CC Docket No. 86-111, Report and Order, 2 FCC Rcd 1298 (1987), *recon.*, 2 FCC Rcd 6283 (1987), *further recon.*, 3 FCC Rcd 6701 (1988), *aff'd , Southwestern Bell v. FCC*, 896 F.2d 1378 (D.C. Cir. 1989).

[18] 47 C.F.R. Part 69

[19] We have also begun to require LECs to file cost information according to standard formats that we dictate in order to simplify the tariff review process. In addition, we have on occasion utilized filing formats that limit the types of costs (and, thus, cost changes) a carrier can use to justify new rates. Commission Requirements for Cost Support Material To Be Filed with January 1, 1990, Access Tariff Revisions, 4 FCC Rcd 6773 (Com.Car.Bur. 1988). *See also* Amendment of Part 67 (New Part 36) of the Commission's Rules and the Establishment of a Federal-State Joint Board, CC Docket No. 86-297, Recommended Decision and Order, 2 FCC Rcd 2582; Report and Order, 2 FCC Rcd 2639 (1987).

[20] *E.g.*, Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, 4 FCC Rcd 3983 (1989); Amendment to Part 67 (New Part 36) of the Commission's Rules and Establishment of a Federal-State Joint Board, CC Docket No. 86-297, Recommended Decision and Order, 2 FCC Rcd 2582; Report and Order, 2 FCC Rcd 2639 (1987).

[21] *See* MTS and WATS Market Structure, 77 FCC 2d 224 (1980) (Second Supplemental Notice) (explaining the division of revenues process among Bell System entities and the settlements process between the Bell System and the independent LECs that compensated LECs for the origination and termination of long distance calls).

[22] We do not mean to suggest that technology was not yet forcing the industry and its regulators to confront competitive issues. The *Second Further Notice* reviews the competitive pressures that, in the 1960s, were already beginning to develop. *Second Further Notice*, 4 FCC Rcd at 2885 (para. 22). As history has borne out, however, the competitive issues reaching the Commission then were mere harbingers of what was to come.

[23] *Id.*

[24] *Id.*

[25] *See, e. g.*, Clemens P. Work, "Wiring the Global Village." *U.S. News & World Report*, February 26, 1990; Calvin Sims, "The Baby Bells Scramble for Europe," *New York Times*, Section 3, page 1, December 10, 1989; S. Prokesch, "Western Europe Moves to Expand Free-Trade Links," *New York Times*, Page A-1, December 8, 1989.

[26] *See, e.g.*, Jack Robertson, "US Losing in Gear, Materials," *Electronic News*, page 5, July 16, 1990. T. Sweeney, "GPT Polishes Profile," *Communications Week*, 249:1, May 22, 1989.

[27] *See* 47 C.F.R. Part 68 (specifying rules for the connection of terminal equipment to the telephone network).

[28] *See, e.g.*, W.J. Baumol, S.B. Blackman, E. Wolff, *Productivity and American Leadership: The Long View* (1989).

[29] *Further Notice*, 3 FCC Rcd at 3219-23 (paras. 38-47). We therefore disagree with the comments of those who argue that there is little empirical basis for a price cap system of regulation. *See* Justice Reply at 8; MCI Reply at 10-11. *See also* CFA Reply at 2 (no evidence that the theoretical problems associated with rate of return occur in practice); NCTA Reply, Statement of S. Besen at 3-4.

[30] The Commission has identified two economic phenomena tending to create inefficient results. The Averch-Johnson effect occurs when carriers have an incentive to adopt inefficient, capital intensive approaches to business operations when the allowed rate of return exceeds the cost of capital, and to adopt inefficient, labor intensive approaches when the cost of capital exceeds the allowed rate of return. Averch & Johnson, *Behavior of the Firm Under Regulatory Constraints*, 52 Amer. Econ. Rev. 1052 (1962). The term "X-inefficiency" refers to a second phenomenon describing the lack of incentive for utilities to control expenses when expenses are included in a firm's annual revenue requirement. Leibenstein, *Allocative Efficiency vs. X-Efficiency*, 56 Amer. Econ. Rev. 392, 392-415 (1966).

[31] *Further Notice*, 3 FCC Rcd at 3221 & n. 64 (noting disallowances totaling $163 million in 1986 and 1987). As noted in the section discussing existing rates, *infra*, the Common Carrier Bureau has disallowed over $2.7 billion in LEC access charges since 1985.

[32] *Accord* NY DPS Comments at 14-15 (supporting price cap regulation of interstate access services with some modifications); Executive Agencies Comments at 1; CSE Comments at 1-2 and Mink Report at 20-21; SBA Comments at 4, 6-7 (arguing that rate of return is ripe for reform); David Comments at 3-7 (price caps creates a "consumer-oriented" set of incentives); Integrated Network Comments at 3-6; Verilink Comments at 4-8; AT&T Comments at 1-3 (supporting "appropriate" price cap regulation for LECs); USTA Comments at 2-3; USTA Reply at 3-5 (citing a broad consensus of the benefits of price caps as revealed in the comments); Ameritech Comments at 4-5; W. Virginia PSC Comments at 1; California Supplemental Comments at 2-4. *See also* Letter from Janice Obuchowski, Administrator, NTIA to FCC Chairman Alfred C. Sikes, May 7, 1990 (price caps can create efficiencies, benefit consumers, and benefit the industry more than rate of return), and Letter from Robert C. Atkinson, Senior Vice President, Teleport Communications Group to FCC Secretary Donna R. Searcy, May 7, 1990 (arguing in favor of eliminating rate of return, although finding equal interconnection guarantees a necessary predicate to price caps).

[33] MCI Comments at 38-40, 52 (by not severing the tie between prices and profits, the type of market-based innovation the Commission seeks will not materialize); SBA Comments at 9 n.8 (while price caps may encourage engineering improvements in equipment, price caps will not, by itself, result in the introduction of new services); Iowa Comments at 2-4 (questioning what technological advances have been delayed, deferred, or rejected under the rate of return system).

[34] *But see* Integrated Network Comments at 3-6 ("[i]n INC's experience, certain carriers have been somewhat discouraged by rate of return regulation from experimenting with new, cost-effective, innovative equipment or service options"); David Comments at 3-7 (rate of return has suppressed LEC demand for technological innovations); NYNEX Comments at 5-6; Rochester Comments at 2.

[35] We therefore disagree with MCI's argument, made in earlier rounds, that while profits from innovations are presently capped at the authorized return, the Commission's practice of passing through to rates the costs associated with innovations provides substantial incentives to innovate. MCI Comments at 38.

[36] *See, e.g.*, Indiana UCC Comments at 7-11; MCI Comments at 17-20; Allnet Comments at 1-4; TeleComm Comments at 2; Ad Hoc Comments at 2-3; NY Clearinghouse Comments at 2-4; Ohio PUC Comments at 1-2; Local Telecom Comments at iii, 2-3; LOCATE Comments at 1-3; IDCMA Comments at 1-3; NCTA Reply at i, 3-7; Maryland PC Reply at 8 (arguing that no effective competition exists with respect to special access services provided to radio and television stations); Justice Reply at 2, 5-7; MCI Reply at 10-11; Hawaii Reply at 4-5; NASUCA Supplemental Reply at 12 & Statement of Ben Johnson Associates, Inc. at 2-4.

[37] A number of parties argue that the system, as proposed, will produce prices that will unjustly enrich the LECs by approximately $5 billion over the next four years. *See, e.g.*, Joint Parties Supplemental Comments at 2-3; AT&T Supplemental Comments at 2; Corporate Committee Supplemental Comments at 7-10; Ad Hoc Supplemental Comments at 2; Aeronautical Radio Supplemental Comments at 2; NASUCA Supplemental Reply at 2; Metropolitan Supplemental Reply at 6; Ad Hoc Supplemental Reply at 3-4, 6-7. *But see* USTA Supplemental Reply at 1-2 (consumers will benefit by as much as $3.4 billion under the price cap proposal); NYNEX Supplemental Reply at 38; Pactel Supplemental Reply at 3-4, 9; BellSouth Supplemental Reply at 2-3. The issue parties raise is grounded in the design and evaluation of the price cap mechanism. We believe that our selection of a higher productivity hurdle (through a different common line formula and a higher offset) and an incentive-based sharing mechanism will make ratepayers better off under price cap regulation than under rate of return, and we explore this finding in our discussion of the price cap mechanism, *infra*.

[38] *See, e.g., Further Notice*, 3 FCC Rcd at 3225 (para. 52).

[39] *See* New York Telephone and New England Telephone and Telegraph Co. Apparent Violation of the Commission's Rules and Policies Governing Transactions with Affiliates, Order to Show Cause and Notice of Apparent Liability for Forfeitures, 5 FCC Rcd 866 (1990).

[40] *Accord* CSE Comments at 1-2 and Mink Report at 20-21; Ameritech Supplemental Comments at 26-28.

[41] *See Further Notice*, 3 FCC Rcd at 3224-25 (paras. 50-51).

[42] *See, e.g.*, MCI Comments at 40-42 ("cost misallocations will make the LECs' monopoly earnings appear smaller for the next periodic review or in applying the automatic stabilizer"); Iowa Comments at 2-4; NARUC Reply at 1-2; DC PSC Reply at 1-2; Hawaii Reply at 1-2; Ohio PUC Comments at 1-2 (lack of competition for access will allow LECs to shift rate burdens to residential and small business users); Metropolitan Comments at 6-8 (LECs will subsidize their more competitive offrings with revenues from their less competitive offerings); SBA Comments at 8 n.7 (LECs might also subsidize a nonregulated activity); Adapso Supplemental Comments at 2-3; Boeing Computer Supplemental Comments at 4-6; Corporate Committee Supplemental Comments at 20-21; Local Telecom Supplemental Reply at 1; Hawaii Supplemental Comments at 3-4; Ad Hoc Supplemental Comments at 36-37 & ETI Report at 21-22; Joint Parties Supplemental Comments at 3; TCA Supplemental Comments at 6; IDCMA Supplemental Reply at 2-3.

[43] In addition, we disagree with commenters who would have us reform our rate of return practices to employ marginal costs in our allocation systems instead of fully distributed costing. *See, e.g.*, Indiana UCC Comments at 15. Simply employing a different cost allocation methodology in rate of return does not create the positive incentives of a price cap system for a LEC to meet, and beat, a pre-established productivity hurdle.

[44] Section 61.38 of the Commission's Rules, 47 C.F.R. § 61.38.

[45] *See, e.g.*, CFA Reply at 1; IDCMA Reply at 3-4 (concurring in the judgment that alternatives to price cap regulation ought to be explored); Allnet Comments at 6-8 (arguing for a system of "Bi-Modal Profit Cap Regulation" that would uniformly bring rates down in accordance with the Gross National Product Price Index less a productivity offset, unless a conventional rate of return calculation produced lower rates). *But see* PRTC Reply at 7-8 (moving rates uniformly does not permit LECs to respond to competition).

[46] *E.g.*, Indiana UCC Comments at 15; IDCMA Comments at ii, 1-3.

[47] MCI Comments at 34-36. MCI argues that rate of return, combined with regulatory lag, can create substantial incentives to efficiency, provided that the review of access tariffs is "strict and speedy," and does not require continuing investigations. MCI states that the access review process is now beginning to work properly, supported by ARMIS reporting and the Tariff Review Plan. *See also* NCTA Reply, Statement of S. Besen at 4-8 (same efficiency effects will accrue if prices are decreased more quickly -- or raised more slowly -- using the rate of return system); Justice Reply at 3-4 (arguing that regulatory lag can increase efficiencies and spur innovation); Ad Hoc Reply at 5 n.2 and ETI Report at 5, 38 (Commission should move on to less ambitious incentive plans); ICA Reply at 4; IDCMA Reply at 3-4.

[48] Delaware, Tennessee, Hawaii, Wyoming, Alaska (for its larger LECs), Arizona, Indiana, Ohio, the District of Columbia, Mississippi, New Hampshire, and North Carolina are the states that currently use traditional rate of return regulation.

[49] Streamlining of competitive offerings, rate freezes, and pricing flexibility are examples of techniques now in use by many states as part of their regulatory reform of LECs.

[50] *See Further Notice*, 3 FCC Rcd at 3254-55 (paras. 105-106).

[51] Ameritech Reply at 30-32; Pactel Reply at ii, 15-16; NYNEX Reply at 2 n.4; United Reply at 8 n.27.

[52] A number of states have incentive plans that fit this general description. Illinois' two-year trial does not adjust rates through an inflation index, but includes a rate freeze on core services, and a tapered sharing plan with a cap (100 percent returned to ratepayers) at 15 percent return on equity, with all sharing to be accomplished by an annual retroactive refund. Missouri's incentive plan is similar, providing a tapered sharing plan and an annual bill credit. Rhode Island's plan, a stipulation among New England Telephone, the commission, and others, includes significant network investment terms. Washington allows downward pricing flexibility on monopoly services, and a sharing plan that leaves the sharing methodology to the discretion of the commission. The Wisconsin plan provides no sharing of excess earnings, but allows the LEC to keep earnings up to 18 percent, and requires it to refund any earnings above that point. North Dakota uses incentive regulation for "essential" services -- including basic. The New Jersey Commission and New Jersey Bell have developed a plan that includes a rate freeze, and is effective 1987-93. Beginning in July 1990, New Jersey Bell can request rate hikes due to inflation and government action. Florida's plan runs 1988-90, has a cap for basic residential service, and sets two levels of sharing to correct for high earnings. Connecticut has had a rate of return-based incentive regulation plan in place for service years. Taking the form of a settlement agree-

ment between SNET and the commission, this plan includes a two and a half year rate moratorium and a sharing arrangement.

[53] For example, SWB and the Kansas Commission have agreed to a freeze on basic services, and to streamline SWB's discretionary services. SWB will invest $110 million in network improvements. When the freeze concludes in 1995, SWB has proposed that it be allowed to change its rates in accordance with an indexing device similar to the one we adopt for SWB's interstate services.

[54] In some states, uncertainty exists as to the desirable degree of deregulation, or the most appropriate means of regulatory reform. Georgia, for example, has considered reform both specifically and generically. Southern Bell (SB) proposed, then withdrew, a Rate Stabilization and Incentive Sharing plan for Georgia in early 1989. This plan included a 3-year freeze on basic residential and single line business, and 50-50 sharing of earnings over 15 percent. Following SB's withdrawal of this proposal, the commission initiated generic hearings on incentive regulation, in which SB seeks discussion of a new reform plan proposing a social contract/incentive regulation plan with some of the same features as its previous proposal. This plan would provide SB with flexibility in areas the commission determines to be competitive or discretionary. Mississippi, New Hampshire, Massachusetts, Utah, Minnesota, Delaware, Oregon, Iowa, Nevada, and Oklahoma are considering specific incentive regulation proposals. Other states, such as Maine, the District of Columbia, Indiana, Louisiana, and North Carolina, are engaged in general studies of regulatory reform, including incentive regulation.

[55] *See, e.g.*, ADAPSO Supplemental Comments at 1; Joint Parties Supplemental Comments at 4; Boeing Computer Supplemental Comments at 4; IIA Supplemental Comments at 1-2; TCA Supplemental Comments at 3; Corporate Committee Supplemental Comments at 1-3; Ad Hoc Supplemental Comments at 2; Aeronautical Radio Supplemental Comments at 1-2; NASUCA Supplemental Comments at 5; SBA Supplemental Comments at 5, 18; IDCMA Supplmental Reply at 1; Boeing Computer Supplemental Reply at 2; DC People's Counsel Supplemental Reply at 1-2.

[56] *E.g.*, MCI Supplemental Reply at 4-6; TCA Supplemental Reply at 5-6; Ad Hoc Supplemental Reply at 9; Executive Agencies Supplemental Reply at 11; Comptel Supplemental Comments at 2-3; Corporate Committee Supplemental Comments at 21-22; DC PSC Supplemental Comments at 9-10; Missouri PSC Comments at 1-2; Michigan PSC Comments at 1; NARUC Reply at 1, 4-5; Local Telecom Comments at 7; Metropolitan Reply at 11-14; Iowa Comments at 2-4.

[57] The PCI for the LECs, like that of AT&T, will be initialized at a level of 100, consistent with its structure as a fixed weight, or Laspeyres, index. *See* Appendix F.

[58] *See, e.g.*, Centel Comments at 9; GTOC Comments at 37-39 and App. 5; Pactel Comments at 19; USTA Comments at 39; NYNEX Comments at 34; Rochester Reply at 16-17; US West Comments at 46. AT&T made no such argument. *See AT&T Price Cap Order*, 4 FCC Rcd at 2974 n. 414.

[59] *AT&T Price Cap Order*, 4 FCC Rcd at 2972-74 (paras. 193-97). The CPI measures the prices urban consumers (about 80 percent of consumers generally) pay for most goods and services for everyday living. The CPI does not include government-provided services (*e.g.*, Medicare) or goods used by industry but not by consumers. The PPI measures changes in the net revenue received by producers, covering all manufactured and processed goods. It does not include retail sales or services.

[60] The historical base period is currently 1982; the base period is adjusted about every ten years.

[61] Further, to the extent that the LECs purchase their factors of production in numerous roughly competitive markets, the GNP-PI's failure to capture their precise factor mix is not crucial. The GNP-PI is a broad-based index that reflects price experience in numerous markets, unlike a narrower index like the CPI which may be subject to forces not relevant to the LECs.

[62] *See, e.g.*, CBT Comments at 5; SWB Comments at 7; Bell Atlantic Comments at 4. *But see* Ad Hoc Comments and ICA Comments, ETI Report at 3 (recommending that we reexamine the GNP-PI to be sure it is a useful measure of LEC input costs).

[63] A current-year-weight, or Paasche, index will fluctuate according to changes in the relative composition of the GNP, as well as to changes in prices. *See* Appendix F.

[64] If, for example, the price of a good remains stable, but the quantity increases, the GNP-PI would remain constant and the GNP deflator would show the change as inflation. The GNP-PI divides current price times base period demand by base price times base period demand; the GNP deflator simply divides total current GNP by total last-period GNP.

[65] *AT&T Price Cap Order*, 4 FCC Rcd at 2973 n.412, citing the Commerce Department's disclaimer that the GNP deflator's "use as a measure of price change should be avoided."

[66] *AT&T Price Cap Order*, 4 FCC Rcd at 2974 (para. 197).

[67] Indiana UCC Comments at 18-21.

[68] No commenters contested our proposal to use the basic price cap formula in use for AT&T (inflation less a productivity offset, plus or minus exogenous costs) for LEC services other than common line. We therefore adopt without discussion the basic formula for use in baskets other than common line. *See* new Section 61.45(b) of the Commission's Rules, 47 C.F.R. § 61.45(b).

[69] Section 69.612 of the Commission's Rules, 47 C.F.R. §69.612.

[70] *See Second Further Notice*, 4 FCC Rcd at 3221 (para. 721). *See also, e.g.*, Ameritech Reply at 14, SWB at 20-22; BellSouth Reply at 24.

[71] *Second Further Notice*, 4 FCC Rcd at 3221. *See also, e.g.*, AT&T Comments at 6-17; MCI Reply at 23-24; Ad Hoc Comments at 14-15, 38-39, and ETI Report at 20-22; API Reply at 10; California PUC Comments at 3; Hawaii Reply at 15; AT&T Supplemental Comments at 16-20; MCI Supplemental Comments at 11-12; California PUC Supplemental Comments at 7.

[72] Clarification of Cap on Common Line Rates, Proposed Price Cap Rules for Local Exchange Carriers, CC Dkt. No. 87-313, Public Notice, 4 FCC Rcd 4775 (Com.Car.Bur. 1989).

[73] BellSouth Comments at 20-22; BellSouth Reply at 24.

[74] USTA Comments at 31; USTA Reply at 21. *See also, e.g.*, SNET Comments at 7.

[75] PRTC Comments at 26-28.

[76] SWB Reply at 36-37.

[77] NYNEX Comments at ii.

[78] AT&T Comments at 18-19; MCI Reply at 23.

[79] AT&T Comments at ii, 6-7; MCI Reply at 23.

[80] Ad Hoc Comments at 14-15, 38-39.

[81] AT&T Comments at 18-19; MCI Reply at 23-24.

[82] Ad Hoc Reply at 4; Ad Hoc Reply and ICA Reply, ETI Report at 31-37.

[83] Identifying current sources of CCL demand growth and, more importantly, predicting future sources and their magnitude, is obviously in part a speculative enterprise. We do not suggest that the 50-50 split is a matter of precise calculation in terms of contributions to increased demand. Rather, it represents an effort to provide some balanced incentives for this particular form of productivity growth. As we gain experience with the price cap plan, we may develop sufficient evidence to calculate a different split. We believe, however, that the critics fail to account for the ability of the LECs to stimulate CCL demand by some or all of the programs and initiatives described in the text. *See* AT&T Supplemental Comments at 16-21 (arguing that whatever the uncertainty about the LECs' actual or projected interstate access productivity experience, there is no question that LECs' CL costs do not vary with demand); MCI Supplemental Reply at 23-24 (arguing that capping common line rates half on a per minute basis and half on a per line basis essentially negates the entire productivity offset for common line services). While the exact scope of this potential source of increased productivity may be uncertain, we continue to believe that it is real and that the Balanced 50-50 formula is a reasonable way to tap into it.

[84] *See, e.g.*, Ex Parte Presentation of USTA to the Staff, Common Carrier Bureau, July 25, 1990 (noting four additional formulas introduced by USTA and AT&T in *ex parte* presentations).

[85] *Second Further Notice*, 4 FCC Rcd at 2969; *Supplemental Notice*, 5 FCC Rcd at 2186.

[86] *See Supplemental Notice*, 5 FCC Rcd at 2212-17 (paras. 67-77) (summarizing the historical evidence).

[87] *Second Further Notice*, 4 FCC Rcd at 3208-12 (paras. 693-700).

[88] *Supplemental Notice*, 5 FCC Rcd at 2222-25 (paras. 92-100). The Frentrup-Uretsky study, included in the *Supplemental Notice* at Appendix C and revised in this Order at Appendix C, analyzes LEC productivity in the post-divestiture period using data submitted by AT&T and USTA. The Spavins-Lande study, included in the *Supplemental Notice* at Appendix D and revised in this Order at Appendix D, attempts to confirm long term estimates of local carrier productivity by examining the indirect productivity of the total telephone industry between 1928 and 1989 using a Consumer Price Index series.

[89] *See, e.g., Second Further Notice*, 4 FCC Rcd at 3363 (critiquing an early Bellcore attempt to measure post-divestiture LEC productivity); *Supplemental Notice*, 5 FCC Rcd at 2217 (critiquing an effort by AT&T to measure post-divestiture LEC productivity).

[90] AT&T Supplemental Comments at 21-25 and Appendix F.

[91] AT&T Supplemental Comments at 7-8 (quoting Lambert and Landwehr analysis from AT&T's Appendix C) and Appendix A, Part I; Ad Hoc Supplemental Comments at 11-13; MCI Supplemental Comments at 10 n.12; TCA Supplemental Comments at 9.

[92] AT&T Supplemental Comments at 8.

[93] *E.g.*, USTA Supplemental Reply at 16; Pactel Supplemental Reply at 19-21; SWB Supplemental Reply at 12.

[94] Appendix C at 1.

[95] *Supplemental Notice* Appendix C.

[96] AT&T Supplemental Comments, Appendix B at 2-5.

[97] *Id.* at 5-10.

[98] USTA Supplemental Reply, Attachment B.

[99] *Id.* at 1, 5-7.

[100] AT&T Comments, Appendix B at 8 n.**.

[101] *Supplemental Notice*, 5 FCC Rcd at 2224-25 and Appendix D.

[102] *See* Appendix D, page 10, n.23.

[103] We also examined an alternative estimate of the adjustments that should be made to control for exogenous demand stimulation, using demand growth at 8 percent per year, rather than the calculated 6.5 percent. Combining the productivity associated with 8 percent demand growth with the high range total productivity target of 2.1 percent provides an estimate of the upper bound of the interstate productivity offset at 1.82 percent using the per line formula.

[104] *See* Appendix C at paras. 12-13 and Chart PROD. The computed 0.41 percent difference between per line and Balanced 50-50 under the long term study differs slightly from the difference computed for the short term study. The long term study is based on slightly different demand growth and includes both switched and special access. The short term study examines only switched access.

[105] USTA and its consultant, NERA, did present a statistical test which they claim indicates the two offsets are like. USTA Supplemental Comments, Attachment B at 19-20. However, their analysis indicates only that, because of the small number of data points in the short term study, the two cannot statistically be shown to be *unlike*. This is a very different question. In any event, this analysis does not answer the ultimate question of which factor to choose.

[106] We therefore agree with commenters who point out that the choice of CCL formula is directly related to the overall productivity offset. The effect of adopting the Balanced 50-50 formula for CCL rates is to impose a substantially higher effective productivity hurdle upon the LECs than under the old 50-50 formula. Even with no growth in usage per line, the Balanced 50-50 formula will increase real CCL rate reductions substantially. We have computed this effect in Appendix C, Chart PROD, page 1. If total CCL usage grows by 8 percent in the future, for example, switched access rates (including CCL) would be pushed down by the same amount as if a productivity offset about 0.75 percent higher were chosen. Additional demand growth would widen this difference even further, because rates will go down under the Balanced 50-50 formula but might have increased under the previous version. Thus, in turning to consideration of the appropriate productivity offset, we recognize that we must take into account the substantial increase in the productivity challenge already produced by the Balanced 50-50 formula, and develop a productivity offset that leads to just and reasonable rates.

[107] We estimate that the 2.8 percent baseline productivity offset using the Balanced 50-50 formula is equivalent to a 3.5 percent offset under the originally proposed formula at 8 percent demand growth.

[108] It is, for example, approximately as challenging as the "simple" plan proposed by AT&T, which is by far the largest access customer and provider of long distance services based on LEC access rates.

[109] *See Second Further Notice*, 4 FCC Rcd at 3212-3214 (paras. 701-06).

[110] *Second Further Notice*, 4 FCC Rcd at 3210 (para. 698).

[111] Contel Supplemental Comments at 19; USTA Supplemental Comments at 11-12; TDS Supplemental Reply at 5; SNET Comments at 22; PRTC Comments at 14-15; Rochester Supplemental Comments at 6-9.

[112] In our discussion of small company issues, *see infra*, Section II. E., we outline possible means for obtaining the information necessary to set a productivity factor that could apply to all small and mid-size companies.

[113] *See* Testimony of L. Christensen *filed in United States v. AT & T*, Civ. Action No. 74-1698 (D.C.C. filed Nov. 20, 1984). *See also Further Notice*, 3 FCC Rcd at 3401 (para. 368).

[114] As explained in the *Further Notice*, total factor productivity includes use of labor, capital, and raw materials as relevant factors, and considers as many distinct outputs as necessary to portray the productivity of a firm. However, on occassion, it is useful to perform productivity studies that limit attention to just two factors, such as labor and capital. Such studies are known as two-factor productivity studies. Similarly, a productivity study that encompasses three relevant factors is known as a three-factor study. *See Further Notice*, 3 FCC Rcd at 3401 (para. 367).

[115] CBT Comments at Appendix A ("Total Factor Productivity Analysis, Cincinnati Bell Telephone" performed by NERA for CBT).

[116] *Id.* at Appendix B ("Cincinnati Bell Telephone Predivestiture Productivity: Three-Factor Model", Performed by NERA for CBT).

[117] *Id.* at Appendix C ("Total Factor Productivity of Interstate Access Services", Cincinnati Bell Telephone Company, performed by NERA for CBT). Similarly, over the period 1984-1988, Bellcore performed an indirect comparative analysis of LEC productivity and that of the independents. Although Bellcore found that the differential was 3.35 percent, the results of this study were criticized by the Commission because of problems with the study's methods. For example, the Commission determined that Bellcore incorrectly estimated certain exogenous costs, and incorrectly assessed special access productivity. *See generally*, *Second Further Notice* at Appendix E.

[118] CBT Comments at Attachment 1 ("Incentive Regulation and Estimates of Productivity" prepared for CBT by NERA, June 9, 1989). *See also Supplemental Notice*, 5 FCC Rcd at 2226 (para 103).

[119] PRTC also performed a study in which it compared annual revenue requirement with GNP-PI to determine productivity trends. While the PRTC study provides an interesting look at how costs changed relative to inflation, productivity studies should encompass an evaluation of inputs relative to outputs, as TFP studies or indirect price analyses do.

[120] Ronan Comments at 4. *See generally* TUECA Comments at 4; NCTA Reply at 2-3; TDS Reply at 16.

[121] *See* Illinois Telco Reply at 2-5.

[122] *See, e.g.*, CBT Comments at Appendix A and Appendix B; Contel Supplemental Comments at 17-18; USTA Supplemental Comments at 10.

[123] CBT Comments at 6; Contel Supplemental Comments at 17-18; Ronan Comments at 4; TUECA Comments at 4; NCTA Reply at 2-3; TDS Supplemental Reply at 16.

[124] USTA Supplemental Comments at 10; NTCA Comments at 6; Centel Supplemental Comments at 16; SNET Reply at 10.

[125] PRTC Comments at 23; USTA Supplemental Comments at 10.

[126] *See* CBT Supplemental Comments at 7 (arguing that it has established the need for a lower productivity offset factor in its own case, and that it should not be forced to operate under the same standards applied to the RBOCs, simply because other LECs have not submitted empirical data demonstrating their own need for relief).

[127] In our discussion of small companies issues, *see infra*, Section II. E., we discuss future investigation of these issues.

[128] United Reply at 1-11.

[129] *Second Further Notice*, 4 FCC Rcd at 3212-19 (paras. 701-714).

[130] *Supplemental Notice*, 5 FCC Rcd at 2252-57 (paras. 163-176).

[131] *See, e.g.*, Bell Atlantic Supplemental Comments at 3-5.

[132] *Second Further Notice*, 4 FCC Rcd at 3212 n.1484.

[133] *See, e.g.*, Pactel Supplemental Comments at 17-21; GTOC Supplemental Comments at 16-17.

[134] United Supplemental Reply at 4-7.

[135] *See, e.g.*, USTA Supplemental Comments at 30 and Attachment F.

[136] *See, e.g.*, Bell Atlantic Supplemental Comments at 8, n.16; Pactel Supplemental Comments at 30.

[137] Bell Atlantic Supplemental Reply at 13; *accord*, SWB Supplemental Comments at 7-17 (arguing that a tapered sharing plan should be used beginning with 25 percent sharing at a level determined by the 60th percentile of the earned returns on capital of the S&P Industrials (currently 14.3 percent) and 50 percent at the 75th percentile (currently 16.1 percent)). *See also* NYNEX Supplemental Comments at 13-15, 18. As an alternative, NYNEX suggests that some portion of productivity gains above the 50-50 sharing mark be targetted to specific network modernization programs beyond the scope of those planned by the company. *See also* Pactel Supplemental Reply at 37-38; US West Supplemental Reply at 14-16 (generally supporting Pactel's proposal, but arguing for a no-sharing zone of 300 basis points above the uniform rate of return, and sharing no higher than 50 percent).

[138] Lincoln Supplemental Comments at 8.

[139] MCI Supplemental Comments at 20-25.

[140] AT&T Supplemental Comments at 25-27.

[141] Aeronautical Radio Supplemental Comments at 8-11.

[142] NASUCA Supplemental Comments at 3-4, Attachment at 16-21.

[143] United Supplemental Reply at 4.

[144] *See, e.g.*, NYNEX Supplemental Comments at 12-17 and Attachment B; Centel Supplemental Comments at 11-12.

[145] *See, e.g.*, US West Supplemental Comments at 34-36; USTA Supplemental Comments at 27.

[146] California Comments at 6-7; California Supplemental Comments at 5-6.

[147] Executive Agencies Supplemental Comments at 14-17.

[148] NASUCA Supplemental Comments, Appendix at 18-21.

[149] NASUCA Supplemental Comments at 3-4.

[150] Ameritech Supplemental Comments at 10-25 and Attachment A.

[151] Aeronautical Radio Supplemental Comments at 9-10; MCI Supplemental Reply at 45-46.

[152] Executive Agencies Supplemental Comments at 17-19.

[153] Allnet Supplemental Comments at 18.

[154] *Id.*

[155] Bell Atlantic Supplemental Comments at 9.

[156] *Id.* at n.18.

[157] *See, e.g.*, USTA Proposed Findings at 21; GTOC Supplemental Submission at Attachment.

[158] Bell Atlantic Supplemental Submission at 3-4; SWB Supplemental Submission at 11.

[159] AT&T Proposed Findings at 18-20; Ad Hoc Proposed Findings at 51-54; Consumer Coalition Proposed Findings at 57-60.

[160] AT&T Proposed Findings at 10. *Accord* Ad Hoc Reply to Supplemental Submissions at 8 (mere fact that the LECs would argue for such high sharing levels "signals dire consequences for ratepayers").

[161] Ad Hoc Reply to Supplemental Submissions at 5-7. *See also* Consumer Coalition Reply to Supplemental Submission at i, 10.

[162] AT&T Reply to Supplemental Submission at 8, 11, and Reply Statement of Dr. Peter M. Sterling at 3-4; Ad Hoc Reply to Supplemental Submission at 12-15.

[163] *See, e.g.* AT&T Supplemental Submission at 4-6.

[164] AT&T Supplemental Submission at 4-6 (sharing should be triggered at 25 basis points above the rate of return whenever rates are increased); Consumer Coalition Supplemental Submission, Appendix A at 5-7 (50 percent sharing of any earnings above the rate of return, and 100 percent return of earnings greater than 50 basis points above the unitary rate of return); Ad Hoc Supplemental Submission at 13-14 (sharing should begin at the unitary rate of return and all earnings greater than 100 basis points above the rate of return should be returned to ratepayers). *But see, e.g.*, Bell Atlantic Reply to Supplemental Submissions at 3-4; BellSouth Reply to Supplemental Submissions at 7-10; NYNEX Reply to Supplemental Submissions at 5-8.

[165] Ad Hoc Supplemental Submission at 4.

[166] *E.g.* USTA Supplemental Submission at 3; GTOC Supplemental Submission at 10; *accord* SWB Supplemental Submission at 6.

[167] NYNEX Supplemental Submission at 4, 7; Pactel Supplemental Submission at 17-19.

[168] *See, e.g.*, Consumer Coalition Reply to Supplemental Submissions at 5-6.

[169] Indeed, given the productivity goal we have adopted for the LECs, we do not anticipate earnings in the upper reaches of the sharing zone during the first four years of the plan.

[170] *See Second Further Notice*, 4 FCC Rcd at 3187 (para. 645).

[171] *Second Further Notice*, 4 FCC Rcd at 3011 (para. 280).

[172] Allnet Comments at 13.

[173] To prevent excessive rate churn, carriers will not be permitted to adjust their PCIs to reflect changes in certain exogenous costs at the time these changes occur. Instead, they will be permitted to adjust their PCI to reflect these changes only once a year on July 1. Such costs are: (1) changes in long term support; (2) changes in transitional support; (3) changes in Subscriber Plant Factor (SPF); and (4) changes in Dial Equipment Minutes (DEM). *See* Appendix B at 61.45(d) (3).

[174] 47 C.F.R. §§ 32.1 *et seq.*

[175] *Accord* Executive Agencies Comments at 7; Ohio PUC Comments at 13.

[176] GAAP changes are adopted by the Financial Accounting Standards Board (FASB).

[177] *See* Section 32.16 of this Commission's Rules, 47 C.F.R. § 32.16.

[178] American Telephone and Telegraph Company, Trans. No. 2304, 5 FCC Rcd 3680 (Com.Car.Bur. 1990) (*AT&T Annual 1990 Price Cap Filing Order*).

[179] MTS and WATS Market Structure, CC Dkt No. 78-72, FCC 87J-2, 2 FCC Rcd 2078 (1987), *recon.*, 3 FCC Rcd 4543 (1988). (*Pooling Order*).

[180] *See Second Further Notice*, 4 FCC Rcd at 3191-3192 (para. 659).

[181] MCI is incorrect in its assessment that these cost changes are merely a cost of doing business. MCI Reply at 26. While it is true that they are a business cost to LECs that experience support changes, such changes are not under LECs' control, and are therefore exogenous.

[182] 47 C.F.R. § 64.901.

[183] *See, e.g.*, Alabama PSC Comments at 4; Ohio PUC Comments at 13; Michigan PSC Staff Comments at 5.

[184] *See Second Further Notice*, 4 FCC Rcd at 3019 (para. 301).

[185] *See, e.g.*, Executive Agencies Comments at 7; Rochester Comments at 4; NY DPS Comments at 11-12; Ohio PUC Comments at 13.

[186] *Second Further Notice*, 4 FCC Rcd at 3017-3018 (para. 292). We do not resolve every issue raised by parties on the regulatory treatment of amortizations. When the Commission reviews its amortization program, these issues will be considered. *See* Rochester Comments at 4 (whether future amortizations of depreciation reserve deficiencies should be given exogenous treatment).

[187] These services include corridor services and interstate-intraLATA services.

[188] *See Second Further Notice*, 4 FCC Rcd at 3187 (para. 646). These rates are subject to Commission review.

[189] SBA Comments at 28-29.

[190] We decline to adopt USTA's suggestion to make exchange access costs incurred in the provision of joint services exogenous for the secondary carrier. USTA Comments at 24-25. *See also* US West Comments at 26-27. Since access charges are being made exogenous solely to provide parity to the regulation of interexchange service providers, we cannot extend exogenous treatment to any and all circumstances in which a LEC pays access charges.

[191] *Second Further Notice*, 4 FCC Rcd at 3010 (para. 275).

[192] *See, e.g.*, Justice Reply at 18; NYDPS Comments at 14; Ohio PUC Comments at 9-10.

[193] Rochester Comments at 4-5. *Accord* Centel Comments at 22-24; SWB Comments at 35; Ameritech Comments at 25-26; Centel Reply at 25.

[194] *Second Further Notice*, 4 FCC at 3009 (para. 274). BellSouth argues that investment tax credit amortizations, and the flow back of excess deferred taxes under Section 203(e) of the Tax Reform Act of 1986, should be given immediate exogenous treatment. *See* BellSouth Comments at 45-46. We note that neither of these tax requirements were made exogenous in the case of AT&T price caps, and that BellSouth has offered no showing as to why these tax requirements should be made exogenous for LECs. Furthermore, BellSouth is the only company that has requested this treatment. Accordingly, we reject BellSouth's argument.

[195] *See Second Further Notice*, 4 FCC Rcd at 3010 (para. 276).

[196] PRTC Comments at 28-30; PRTC Reply at 19-20.

[197] *See, e.g*, USTA Comments at 23; USTA Reply at 36; CBT Comments at 9-10; Rochester Comments at 5 n.9.

[198] Michigan PSC's criticism that endogenous treatment of equal access costs is necessary to maintain proper jurisdictional cost allocations is not well founded. The separations process that determines cost allocation is not affected by our determination that a particular cost is exogenous. *See* Michigan PSC Comments at 4.

[199] *See* GTOC Comments at 24-30; Pactel Comments at 13-14; Ameritech Comments at 29-32; SNET Comments at 8-9; CBT Comments at 8-9; PRTC Reply at 18-19; SNET Reply at 15.

[200] *See, e.g., Second Further Notice*, 4 FCC Rcd at 3015 (para. 290) (citing 47 USC § 220 (b)).

[201] *See generally* Property Depreciation, 83 FCC 2d 267 (1980), *recon. denied* 87 FCC 2d 916 (1981).

[202] *Second Further Notice*, 4 FCC Rcd at 3016 (para. 291).

[203] Nor do we believe, as GTOC contends, that exogenous treatment of the costs associated with changes in depreciation rates violates *Arizona Grocery Co. v. Atchison Topeka and Santa Fe Ry. Co.*, 284 U.S. 370 (1932). In *Arizona Grocery*, the Court held that the Interstate Commerce Commission, after prescribing maximum rates, could not later order refunds based on a finding that rates below the prescribed maximum were unjust and unreasonable. GTOC cites the case for the broad proposition that an agency may not retroactively penalize a carrier for doing what the agency had sanctioned. GTOC's citation to *Arizona Grocery* is clearly inapposite. As noted above, after the Commission prescribes depreciation rates, carriers retain authority to determine when to deploy and retire equipment. Hence, unlike the rate prescription in *Arizona Grocery*, which the Court found was equivalent to a finding by the ICC that rates below the maximum were just and reasonable, a depreciation prescription does not represent any judgement by the Commission regarding the proper rate at which a carrier should deploy and retire equipment. Unlike *Arizona Grocery*, therefore, the Commission in prescribing depreciation rates can not be said to be requiring or sanctioning any carrier investment decisions in the first place.

[204] *See* SWB Reply at 40; CBT Comments at 20.

[205] CBT Comments at 20; SWB Reply at 39. "Economic life" can be defined as the period during which the equipment meets the customer's needs and also provides a cost/benefit advantage over other technologies.

[206] *See* Ameritech Comments at 31-33.

[207] *See Second Further Notice*, 4 FCC Rcd at 3016 (para. 292). *See also* Property Depreciation, 87 FCC 2d 916, 918-19 (1981).

[208] SNET Comments at 9. *See also* CBT Comments at 9; Executive Agencies Comments at 31-33.

[209] NY PDS Comments at 12-13.

[210] Pactel Reply at 64-67.

[211] We are not persuaded that small companies will be disproportionately burdened if cost changes due to changes in depreciation rates are not considered exogenous. Like larger companies, smaller companies exert control over these costs.

[212] United Comments at 11-12; TUECA Comments at 5.

[213] *See Second Further Notice*, 4 FCC Rcd at 3020-3021 (para. 304).

[214] *Second Further Notice*, 4 FCC Rcd at 3020 (para. 303).

[215] *Id.*

[216] *Further Notice*, 3 FCC Rcd at 3317 (para. 223).

[217] *Second Further Notice*, 4 FCC Rcd at 3229 (para. 742).

[218] Local Exchange Carriers' Individual Case Basis DS3 Service offerings, CC Docket No. 88-136, 4 FCC Rcd 8634 (1989) (*ICB Order*), *recon.* 5 FCC Rcd 4842 (1990).

[219] These are also known as "special construction" offerings.

[220] *Second Further Notice*, 4 FCC Rcd at 3229-30 (para. 743).

[221] *See* Investigation of Access and Divestiture Related Tariffs, 101 FCC 2d 911 (1985) (describing the presubscription process LECs are required to follow); Bell Atlantic Tariff F.C.C. No. 1, 5 FCC Rcd 2990 (Com.Car.Bur. 1990) (permitting a tariff to become effective that allows Bell Atlantic to charge a fee to an interexchange carrier for an unauthorized change order).

[222] As stated in the *Second Further Notice*, the price cap plan for LECs affects only federally tariffed offerings. We do not include as part of price cap regulation bilaterally negotiated contracts between a LEC and a mobile service provider. *Second Further Notice*, 4 FCC Rcd at 3229, n.1528.

[223] Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, FCC 84-51, released February 17, 1984 at para. 81. *See also* AT&T Communications, The Chesapeake and Potomac Telephone Company of Maryland, Mimeo 1225, released December 6, 1984.

[224] An example of the type of Federal Government offering we would exclude is service offered as part of FTS 2000. We similarly exclude from price cap regulation any type of contract services offered by a LEC, and will subject such an offering to conventional tariff review processes. As noted in the case of AT&T, these offerings may raise controversial issues under the Communications Act. 4 FCC Rcd at 3034-35 (para. 330).

[225] For example, complaints filed against an excluded service, containing a *prima facie* showing that a rate for an excluded service is unlawful, would require the carrier to come forward with additional information to justify the rate. *See* Section 208 of the Communications Act, 47 U.S.C. § 208.

[226] We therefore decline to impose service-by-service reporting of earnings, as requested by Allnet. Allnet Comments at 14-15.

[227] *Second Further Notice*, 4 FCC Rcd at 3229 (para. 742).

[228] *See* Bell Atlantic Comments at 4.

[229] As we have discussed in prior Notices, the most economically efficient set of prices are those based on marginal cost. Price caps, by eliminating the requirements that carriers adhere to fully distributed costing, permits movement towards prices based on marginal costs. *Second Further Notice*, 4 FCC Rcd at 2924-25 (paras. 105-06).

[230] *Id.* at 3235-40 (paras. 751-59).

[231] We describe the tariff standards associated with rates within the "no suspension" zone and for rates outside of it, in the tariff standards section, II.D, Evaluation of Price Cap Tariffs, *infra*.

[232] *See also* Section 61.3(f) of the Commission's Rules, 47 C.F.R. § 61.3(f) (defining baskets for the purpose of the application of the price cap rules).

[233] *See also* Section 61.3(d) of the Commission's Rules, 47 C.F.R. § 61.3(d) (defining bands).

[234] *See also* Section 61.3 (ee) of the Commission's Rules, 47 C.F.R. § 61.3(ee) (defining service categories).

[235] The categories proposed in the *Second Further Notice* were: (1) voice grade; (2) metallic; (3) telegraph; (4) program audio; (5) video; (6) wideband analog; (7) wideband data; (8) Digital Data Service; and (9) high capacity.

[236] *Second Further Notice*, 4 FCC Rcd at 3239 (para. 758).

[237] *Accord* SWB Comments at 9.

[238] An exception to this characterization is GTE Hawaiian, which offers international MTS and interstate access service, in addition to local service.

[239] *Accord* United Comments at 10-11 (arguing that because interexchange services are subject to as much competition as AT&T's interexchange services, they should be subject to a similar price cap plan).

[240] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, 4 FCC Rcd 4797 (1988) (*Strategic Pricing Order*), *recon.* 5 FCC Rcd 400

(1990). Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, 4 FCC Rcd 8634 (1989), *recon.* 5 FCC Rcd 4842 (1990).

[241] A number of LEC tariffs, including some covering DS1 and DS3 services, are the subject of pending tariff investigations. As noted in the discussion of existing rates, initial rates for price caps carriers will be adjusted to reflect the outcome of these investigations in cases where the investigations conclude prior to price cap implementation. After the implementation of price cap regulation, investigations may also result in adjustments to indexes, to give full effect to finding of unlawfulness.

[242] AT&T Comments at 3-4, 26-30 (advocating six baskets: common line, local switching, local transport, voice grade special access, high capacity digital special access, all other digital special access). *Accord* Ad Hoc Reply and ICA Reply, ETI Report at 34; API Reply at 13-14; MCI Comments at 59-60; TCA Comments at 12; *see also* Aeronautical Radio Supplemental Comments at 7-8; Allnet Supplemental Comments at 21-22; IDCMA Supplemental Reply at 7-8.

[243] BellSouth Supplemental Comments at 31-32; Contel Supplemental Comments at 22-23. Other LECs accept the three basket proposal. Bell Atlantic Comments at 4; US West Comments at 33; USTA Comments at 31.

[244] *See AT & T Price Cap Order*, 4 FCC Rcd at 3065 (para. 386).

[245] As discussed in previous decisions in this proceeding, baskets and bands are to some extent substitutable. *Id.* at 3052 (para. 360).

[246] In response to Allnet's argument concerning the applicability post-price caps of the nonpremium discount to carrier common line rates in non-equal access areas, we note that our rules continue to require the discount. *See* Allnet Supplemental Comments at 24 n.45.

[247] *Second Further Notice*, 4 FCC Rcd at 3235 (para. 752).

[248] Some commenters support separating interexchange services from the special access basket. *E.g.*, IDCMA Reply at 7-8; US West Comments at 40. Other commenters advocated creating several different baskets for various types of interexchange offerings. *E.g.*, AT&T Comments at 30; Allnet Supplemental Comments at 21-22.

[249] United Comments at 10-11.

[250] *E.g.*, Bell Atlantic Reply at 17-18; Pactel Reply at 17-19.

[251] *See* CBT Comments at 16-17; United Comments at 10.

[252] Corridor services are interstate offerings provided by RBOCs as exceptions to the requirements of the Modified Final Judgment.

[253] This is as true for the 3 percent offset we developed for AT&T and use in the LEC interexchange basket as it is for the LEC productivity factors we apply to the interstate access baskets.

[254] Hawaii Comments at 7; Hawaii Supplemental Comments at 13-14. *Accord* GTOC Reply at 18-19. *See also* LD/USA Reply at 5 (also favoring the creation of an additional basket for GTE Hawaiian's IMTS).

[255] Hawaii Reply at 19-20; GTOC Comments at 38.

[256] Telenet Comments at 3-4; Comptel Supplemental Comments at 4-5; MCI Supplemental Comments at 32-34.

[257] *Accord* Contel Comments at 9; NYNEX Comments at 26; SWB Comments at 7, n.7; USTA Reply at 27. We disagree with Telenet's argument that a separate category is required to ensure that enhanced service providers do not pay for the cost of equal access when they buy local switching. Since carriers subject to price caps are generally substantially well along in the equal access conversion process, carriers are not facing new major financial commitments to convert their networks. The cost shifting opportunities that might have been present several years ago are no longer available.

[258] *E.g.*, Aeronautical Radio Supplemental Comments at 7.

[259] *E.g.*, NYNEX Comments at 26; BellSouth Reply at 48; Contel Comments at 8-9. *But see* MCI Supplemental Reply at 55.

[260] *See, e.g.*, Comptel Supplemental Comments at 4-5 (arguing that we should resolve the issue of how to band dedicated transport now, one year in advance of the expiration of the "equal price per unit of traffic rule" contained in the MFJ).

[261] Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements, Notice of Proposed Rule Making, CC Docket No. 89-79, 4 FCC Rcd 3983 (1989).

[262] Demand trends were analyzed based on the 1990 Tariff Review Plan Tier 1 Rollup, DMD-4.

[263] *See, e.g.*, US West Supplement Comments at 60-64; GTOC Supplemental Comments at 22; SNET Supplemental Comments at 15-16.

[264] *E.g.*, Corporate Committee Supplemental Comments at 12-14.

[265] *E.g.*, Boeing Computer Supplemental Comments at 19-20; Aeronautical Radio Supplemental Comments at 3.

[266] *E.g.*, TCA Supplemental Comments at 19-20; Allnet Supplemental Comments at 22-23.

[267] MCI Supplemental Comments at 35; IDCMA Supplemental Reply at 3-4. *See also* Allnet Supplemental Comments at 22-23 (arguing that the 5 percent bands on local transport and local switching will not protect interexchange carriers from discriminatory treatment). We disagree with Allnet's contention that the LECs will bias rates in favor of AT&T's network configuration. Allnet has not demonstrated why the LECs would have the incentive to benefit one interexchange carrier, particularly when our capping mechanism provides rewards for increases in demand.

[268] *E.g.*, AT&T Supplemental Comments at 29-31 (presenting a numerical example of how LECs could breach the crossover ratios established under rate of return in the first year of price caps, absent further controls on DS1 and DS3 prices).

[269] For similar reasons, we also abandon the crossover relationship previously established for 4-wire and 2-wire special access serving arrangements. Investigation of Special Access Tariffs of Local Exchange Carriers, Phase I, CC Docket No. 85-166, 1 FCC Rcd 427 (1986), *remanded Western Union Corp. v. FCC*, 856 F.2d 315 (D.C. Cir. 1988).

[270] Ameritech Comments at 35-36, 43; Bell Atlantic Reply at 18-19; Pactel Comments at 30; SWB Reply at 34; GTOC Supplemental Comments at 23-24. *But see* US West Supplemental Comments at 65 (arguing that a 5 percent upper limit is not sufficient to achieve efficient pricing).

[271] AT&T Comments at 27; MCI Reply at 10 n.21; Ad Hoc Comments at 25-26; NY Clearninghouse Comments at 13-14; NARUC Reply at 6-7; Missouri PSC Comments at 8-9.

[272] *See, e.g.*, AT&T Supplemental Comments at 23-25 (proposing a rate freeze); NY Clearinghouse Comments at 13-14 (proposing an upper limit of 1 percent for traffic sensitive categories and an upper limit of 2 percent for special access); Ohio PUC Comments at 6-7 (favoring a 2 percent upper band).

[273] *See Further Notice*, 3 FCC Rcd at 3238-40 (paras. 77-81) (discussing the New York rate moratorium then in effect).

[274] *See, e.g.*, NY Clearinghouse Comments at 13-14 (arguing that the upper bands would have permitted increases five times greater than actually experienced in the last three years).

[275] *See* Ad Hoc Comments and ICA Comments, ETI study at 32-33. ETI provides a study of the three largest categories of interstate access service, purporting to show that price increases for these categories have rarely reached 5 percent. While we do not necessarily endorse the study's findings, it is consistent with the recent history of access charges, which have been falling dramatically in recent years in response to regulatory reforms and the increase in demand for service. Since the regulatory reforms that gave rise to those decreases are at an end, we do not believe the 5 percent band gives LECs unwarranted upward flexibility.

[276] We disagree with Illinois that the 4 percent pricing bands operating on two AT&T service categories in the residential and small business basket require us to place tighter constraints on the LECs' bands. The 4 percent upper limits to two MTS categories and the 1 percent upper limit on the average residential rate recognize traditional universal service concerns this Commission has had with respect to residential service. *AT&T Price Cap Order*, 4 FCC Rcd at 3060 (paras. 376-77). Accordingly, we reject Illinois' argument.

[277] *See, e.g.*, Pactel Supplemental Comments at 67-68; Ameritech Supplemental Comments at 30; US West Supplemental Comments at 65; GTOC Supplemental Comments at 24-25; Ad Hoc Supplemental Comments at 39-41.

[278] *But see* Metropolitan Supplemental Comments at 12-17 (arguing that 5 percent lower bands are too blunt an instrument to correct the subtle forms of predation LECs will engage in). We disagree with Metropolitan's premise that price bands are less effective than rate of return in controlling more subtle anticompetitive abuses, such as price disciplining. Price cap regulation encourages LECs to price within the no suspension zone in order to obtain the presumption of lawfulness associated with such filings. Under rate of return, carriers were free to file substantial rate changes, and there was little incentive for LECs to keep the changes in rate levels small.

[279] We also reject suggestions to give LECs "credit" in their Actual Price Index (API) computations only for the first 5 percent of a below band rate decrease. *See* Ad Hoc Supplemental Comments at 6, 40 n.33; MCI Supplemental Reply at 57. The "no-credit" rule was raised and rejected in earlier rounds of this proceeding. *AT&T Price Cap Order*, 4 FCC Rcd at 3066 (para. 388). We believe that if a LEC can support a below-band filing, the LEC's API level should reflect, in full, what its name implies -- actual prices.

[280] *Further Notice*, 3 FCC Rcd at 3434 (para. 443).

[281] The exception to this rule is the common line basket. *See* Appendix E.

[282] This determination is consistent with their structure as Laspeyres indexes. *See* Appendix F for a discussion of issues related to the initiation of indexes.

[283] Annual 1990 Access Tariff Filings, CC Docket No. 90-320, DA 90-887, 5 FCC Rcd 4142 (Com.Car.Bur. 1990)

[284] Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, CC Docket No. 89-624, FCC 90-315, adopted September 19, 1990 (*Represcription Order*).

[285] Annual 1990 Access Tariff Filings, CC Docket No. 90-320, 5 FCC Rcd 4177 (Com.Car.Bur. 1990) (*1990 Access Order*).

[286] *See* 4 FCC Rcd at 3023 (para. 308) (explaining why the indexes used in price cap regulation are Laspeyres indexes and are subject to certain economic conventions in their application).

[287] MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, Third Report and Order, 93 FCC 2d 241 (1983); Supplemental Order, 94 FCC 2d 852 (1983); *recon.*, 97 FCC 2d 682 (1983); *recon.*, 97 FCC 2d 834 (1984). Numerous subsequent orders in this docket have considered various aspects of access offerings and charges.

[288] Revision of the Uniform System of Accounts for Class A and Class B Telephone Companies, CC Docket No. 78-196, 51 Fed. Reg. 43498 (Dec. 2, 1986); *recon.*, 2 FCC Rcd 1086 (1987); *recon.*, 2 FCC Rcd 6555 (1987).

[289] Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, CC Docket No. 86-111, 2 FCC Rcd 1298 (1987); *recon.*, 2 FCC Rcd 6283 (1987); *recon.*, 3 FCC Rcd 6701 (1988); *upheld*, *Southwestern BellCorp. v. FCC*, 896 F.2d 1378 (D.C. Cir. 1990).

[290] *See* Refinement of Procedure and Methodologies for Represcribing Interstate Rates of Return for AT&T Communications and Local Exchange Carriers, CC Docket No. 87-463, Notice of Proposed Rule Making, 2 FCC Rcd 6491 (1987); Deferral Order, 3 FCC Rcd 1697 (1988); Order, 5 FCC Rcd 197 (1989).

[291] Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67, and 69 of the FCC's Rules), CC Docket No. 86-182, 2 FCC Rcd 5770 (1987); *recon.*, 3 FCC Rcd 6375 (1988).

[292] *See* Commission Requirements for Cost Support Material To Be Filed with Access Tariffs on March 1, 1985, Public Notice, Mimeo No. 2133, released Jan. 25, 1985. The Common Carrier Bureau disallowed $214 million of the LEC's annual 1985 access charges. Annual 1985 Access Tariff Filings, Memorandum Opinion and Order, Mimeo 7109 (Sept. 17, 1985).

[293] Annual 1990 Access Tariff Filings, CC Docket No. 90-320, 5 FCC Rcd 4177 (Com.Car.Bur. 1990) (*1990 Access Order*). The Bureau has subsequently reversed approximately $84.4 million in disallowances.

[294] Access Tariff Filing Schedules, Report and Order, CC Docket No. 88-326, 3 FCC Rcd 5495 (1988).

[295] Local Exchange Carrier Access Tariff Rate Levels, CC Docket No. 88-554, 4 FCC Rcd 762 (Com.Car.Bur. 1988) (*1988 Order to Show Cause*) ; Local Exchange Carrier Access Tariff Rate and Earnings Levels, CC Docket No. 90-1, 5 FCC Rcd 482 (Com.Car.Bur. 1990) (*1990 Order to Show Cause*) ; Local Exchange Carrier Access Tariff Rate Levels, CC Docket No. 90-1, 5 FCC Rcd 1070 (Com.Car.Bur. 1990) (*1990 Supplemental Order to Show Cause*).

[296] MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, Third Report and Order, 93 FCC 2d 241, 314 (1983).

[297] *See generally* Investigation of Access and Divestiture Related Tariffs, 97 F.C.C. 2d 1082 (1984) (*ECA Tariff Order*) ; Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I, Mimeo No. 2802, relased Mar. 7, 1984 (*Non-ECA Tariff Order*) ; Investigation of access and Divestiure Related TAriffs, CC Docket No. 83-1145, Phase I and Phase II, Part 1, FCC 84-524, released Nov. 9, 1984.

[298] Investigation of Access and Divestiture Related Tariffs, CC Docket No. 83-1145, Phase I and Phase II, Part 1, Order, FCC 85-70, released Feb. 19, 1985, at para. 24; Order, FCC 85-100, released Mar. 8, 1985.

[299] *See* Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Order Designating Issues for Investigation, Mimeo No. 4726, released May 24, 1985. The Commission completed its investigation of most of the rate structure and cost allocation issues, and found that the rates were reasonable, with exceptions regarding disallowance for un-

used video cable, some allocations of voice grade costs and the prescribed 2-wire to 4- wire ratio. Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase I, FCC 86-52, released Jan. 24, 1986, *aff'd on review*, 1 FCC Rcd 427 (1986). The investigation of the special access rate levels of certain carriers concluded with the order of some disallowances. Investigation of Special Access Tariffs of Local Exchange Carriers, Mimeo No. 3436, released Mar. 27, 1986. In another part of the investigation, the Commission found that non-recurring rates should recover the full costs of the associated non-recurring activities. Investigation of Interstate Access Tariff Non-Recurring Charges, CC Docket No. 85-166, Phase I, Part 3, 2 FCC Rcd 3498 (1987).

[300] *See* Annual 1985 Access Tariff Filings, Mimeo No. 7401 (Com.Car.Bur. Sept. 30, 1985).

[301] Annual 1987 Access Tariff Filings, 2 FCC Rcd 280 (Com.Car.Bur. 1986); Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part I, Memorandum Opinion and Order, 2 FCC Rcd 3507 (Com.Car.Bur. 1987).

[302] Annual 1989 Access Tariff Filings, 4 FCC Rcd 3638 (Com.Car.Bur. 1989). *See also* Investigation of Special Access Tariffs of Local Exchange Cariers, CC Docket No. 85-166, Phase II, Part 1, 4 FCC Rcd 4797 (1988) (*Strategic Pricing Order*). The *Strategic Pricing Order* considered that a pricing ratio of 4 to 8 voice grade (VG) circuits to one high capacity (HiCap) circuit served as an acceptable surrogate for detailed cost showings, and produced a price range within which HiCap rates appear to be reasonable.

[303] Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, 5 FCC Rcd 400 (1990) (*Strategic Pricing Reconsideration Order*).

[304] *Strategic Pricing Reconsideration Order*, 5 FCC Rcd at 407. This Order affirms the 4-8 to one cross-over ratio as an indicium of reasonableness.

[305] *See* Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, 5 FCC Rcd 412 (1990) (*Strategic Pricing Refund Order*), *recon.* FCC 90-274, released Aug. 1, 1990 (*August 1990 Order*) (affirming DS 1 refunds, but exempting LECs from paying refunds for DDS rates for procedural due process reasons).

[306] Annual 1989 Access Tariff Filings, 4 FCC Rcd 3638 (Com.Car.Bur. 1989) (*1989 Access Order*), at 3693-94 (paras. 509-514), 3708 (para. 667).

[307] *1990 Access Order*, 5 FCC Rcd 4177 at 4231 (para. 488).

[308] Ad Hoc Comments at 32-33; Networks Comments at 4-7.

[309] We also disagree with commenters who imply that our authority to order any refunds has been impaired by the the Court of Appeal decision relating to an automatic refund mechanism. *AT & T v. FCC*, 836 F.2d 1386 (D.C. Cir. 1988). We view our authority to order refunds under Section 204(a) of the Act to be unaffected by that decision. *See August 1990 Order*. *See also New England Tel. & Tel. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987), *reh'g and reh'g en banc denied* (Nov. 2, 1988).

[310] Metropolitan Supplemental Comments at 10-13.

[311] *See* SBA Supplemental Comments at 16; Boeing Computer Supplemental Comments at 13-14; MCI Supplemental Reply at 58-63; NASUCA Supplemental Comments, Statement of Ben Johnson Associates, Inc. at 22 (reasonableness of rates cannot be inferred in the absence of an investigation).

[312] SBA Supplemental Comments at 17-18; DC PSC Supplemental Reply at 7-8 (suggesting a rate review at the time of implementation). SBA's suggested method, evaluating loop costs and cost of living differences, raises many complexities and much uncertainty, since interstate access includes switching, transport and information functions not embedded in loop costs.

[313] *Supplemental Notice*, 5 FCC Rcd at 2279-80.

[314] *See, e.g.*, Ad Hoc Comments at 6, 31-32; MCI Reply at 44-46.

[315] In the *Supplemental Notice*, we proposed that any retargeting resulting from over- or under-earnings be treated as exogenous during the six months leading up to price caps. However, since we decided to conduct a full access filing for July 1, 1990, mid-course corrections during the six-month period leading up to price caps are likely to be premature. We will not give any such corrections routine exogenous treatment.

[316] If an investigation results in a refund of rates from a previous time period - *i.e.*,there is no finding that the unlawful practice is part of existing rates - no PCI adjustment need result.

[317] *See* Allnet Supplemental Comments at 19 (arguing for an across the board rate cut of 3 percent); NASUCA Supplemental Comments, Statement of Ben Johnson Associates, Inc. at 22 (arguing that an upfront rate cut is a reasonable alternative to a rate case).

[318] *See* Hawaii Comments at 7-9; Hawaii Reply at 17-19; Hawaii Supplemental Comments at 14-18.

[319] We note, for example, that GTE-Hawaiian's IMTS revenues, which grew throughout 1986 and 1987, dropped by about 6 percent in 1988, the year of AT&T's entry into the Hawaii IMTS market. In 1989, when Sprint and MCI entered the market, GTE-Hawaiian's IMTS revenues fell an additional 26 percent.

[320] In 1989, the Commission approved the construction and operation of the TPC-4 common carrier cable. *See* American Telephone and Telegraph Company, 4 FCC Rcd 8042 (1989). Three other Pacific cable projects affecting Hawaii are also under consideration by this Commission: Haw5 (File No. I-T-C-90-081), PacrimEast (File No. I-T-C-90-072), and PacrimWest (File No. I-T-C-90-097).

[321] As with other carriers, if these rates should later be shown to be unreasonable, the PCI can be appropriately adjusted.

[322] *See, e.g.*, Regulation of International Accounting Rates, CC Docket No. 90-337, Notice of Proposed Rule Making, 5 FCC Rcd 4948 (1990).

[323] For example, SWB, the smallest RBOC, has 11.76 million access lines. United Telephone, the largest non-RBOC/GTOC LEC, has 3.8 million, and Lincoln, the smallest Tier 1 LEC, has .23 million. The balance of total assets is similar: SWB's $21.16 billion compares to United's $9.8 billion and Lincoln's $278 million.

[324] *See* Sections 69.605 and 69.606 of our Rules, 47 C.F.R.§§ 69.605, 69.606.

[325] USTA Comments at 10-12; TDS Reply at 8; SNET Reply at 5, n.**; Rochester Reply at 16-17; USTA Supplemental Comments at 11-12; NECA Supplemental Comments at 2, n.5; TDS Supplemental Reply at 8; SNET Supplemental Comments at 22.

[326] Some parties suggest that price cap regulation should be entirely optional. US West Comments at 15; Ohio PUC Comments at 5, 14-15; CBT Reply at 14; Contel Comments at 22-23 n.2. We affirm the discussion in the *Second Further Notice*, and conclude that the price cap plan will be most effective if it is mandatory for the largest carriers.

[327] *See* Contel Comments at 22; TDS Comments at 5-12; Lincoln Comments at 2; SNET Comments at 6; Rochester Comments at 9-10; Rochester Reply at 16-17; PRTC Reply at 11; TUECA Reply at 2-3. Some of these carriers indicate they would prefer that no carriers be subject to mandatory price cap

regulation, but that if price caps is mandated, the requirement should be confined to the RBOCs. *See, e.g.*, Rochester Comments at 9-10; SNET Comments at 6.

[328] GTOC currently has total assets exceeding those of Bell Atlantic, the largest RBOC, and about one quarter the total for all the RBOCs. (GTOC total assets = $31.996 billion; Bell Atlantic total assets = $26.22 billion; all RBOCs' total assets = $142.25 billion). GTOC provides access service in 31 study areas, compared with 7 for Bell Atlantic and 51 for all the RBOCs together. GTOC's 15.14 million access lines approach Bell Atlantic's total, 17.056 million, and comprise over 11 percent of all LEC access lines. These figures do not include Contel, whose merger with GTOC is currently underway.

[329] The RBOCs and GTOC control 118,798,000 (about 88 percent) of the 135,010,000 access lines provided by the industry.

[330] CBT Supplemental Comments at 7; SNET Supplemental Comments at 5; NTCA Supplemental Comments at 6.

[331] *See* Commission Requirements for Cost Support Material To Be Filed with Access Tariff on March 1, 1985, Public Notice, Mimeo No. 2133, released Jan. 25, 1985. Tier 1 companies are defined as those companies having annual revenues from regulated telecommunications operations of $100 million or more. Commission Requirements for Cost Support Material To Be Filed with 1990 Annual Access Tariffs, 5 FCC Rcd at 1364 (para. 4) (1990).

[332] *See* Executive Agencies Comments at 2; Illinois Reply at 16; Ad Hoc Reply and ICA Reply, ETI Report at 9-11; Indiana UCC Reply at 7; CBT Comments at 4; NERA Study at 13.

[333] As part of its continuing efforts to maintain geographically averaged rates and to promote universal service, the Commission established NECA and initially required all LECs to participate in its tariffs. *See* 47 C.F.R. §§ 69.601 *et seq*. NECA administers three pools: the carrier common line pool, the end user common line pool, and the traffic sensitive pool. By mandating LEC participation in the pools, the Commission was able to secure the cooperation of lower cost LECs in contributing to the maintenance of averaged rates throughout the country. The Commission has subsequently permitted LECs to withdraw from NECA pools, provided that the LECs continue to supply certain financial support to high cost companies that remain in the pools. *See* § 69.612 of the Rules. Participation in the NECA pools is thus no longer mandatory, but LECs that do participate continue to receive the support they would have received had pools remained mandatory. While the pooling system has been exceedingly effective in assisting high cost companies and their ratepayers, the system necessarily involves a significant sharing of financial risks by pool participants and a resultant diminution of incentives to operate efficiently.

[334] *Second Further Notice*, 4 FCC Rcd at 3169-70, 3176-78 (stating that price cap regulation requires fundamental alterations to the purposes, structure, and operation of both the traffic sensitive and common line pools, and that pool participation diminishes a LEC's responsiveness to incentives).

[335] This exclusion from price caps does not apply to intra-company "mini-pools," averaged geographic rates, and similar mechanisms resulting from the cooperation of affiliated companies in preparing access rates for different geographic areas. Price cap tariffs can be filed on the basis of such pools as well as on a simple company-wide basis.

[336] Current NECA rules limit LECs to one annual June notice of depooling, and prevent LECs from receiving any transitional support. Long term support is still available. *See* 47 C.F.R. § 69.612.

[337] *See, e.g.*, NECA Supplemental Comments at 2 n.5 (asserting option to choose or reject price caps must be permanently maintained for small LECs); USTA Comments at 19-20, 37-38; Illinois Telco Reply at 7; TUECA Comments at 6-7; Alltel Comments at 33; OPASTCO Comments at 5-6; Rochester Comments at 24; PRTC Comments at 18.

[338] *See* new Section 69.3(i)(4) of the Commission's Rules, 47 C.F.R. § 69.3(i)(4).

[339] USTA Supplemental Comments at 35-36 (including a table showing USTA's proposed price cap implementation schedule); PRTC Supplemental Comments at 4; OPASTCO Supplemental Comments at 5-8; Alltel Supplmental Comments at 13-14.

[340] Cost affiliates are affiliated LECs that develop rates based on costs. Average schedule affiliates, as discussed below, are affiliated LECs that are compensated for the costs of providing service on the basis of formulas derived from aggregate LEC data.

[341] *Second Further Notice*, 4 FCC Rcd at 3178 (para. 628).

[342] *See, e.g.*, Rochester Comments at 12-13; Alltel Comments at 20-21. *See* discussion of jurisdictional cost shifting at Part III.B., *infra*. The record in this proceeding establishes that improper cost shifting can and does occur between affiliates of LEC holding companies, and that particularly intensive efforts are often necessary to detect and correct it.

[343] *See, e.g.*, DOJ Reply at 16; TDS Reply at 8-10.

[344] *Second Further Notice*, 4 FCC Rcd at 3178; *Supplemental Notice*, 5 FCC Rcd at 3174, 3178 (stating that reducing incentives to shift costs has been one of our principal objectives throughout this proceeding). *See also* New York Telephone Co. and New England Telephone & Telegraph Co., Apparent Violations of the Commission's Rules and Policies Governing Transactions with Affiliates, 5 FCC Rcd 866 (1990).

[345] Alltel Comments at 16-17; Alltel Supplemental Comments 7-8; Rochester Comments at 12.

[346] This approach is analogous to our approach in *Computer II* and *Computer III*, where the Commission first acted cautiously to control cost shifting by adopting structural separation rates for enhanced service operations. In that context, the Commission monitored the situation and ultimately determined that a less intrusive regulatory approach would be effective.

[347] *See, e.g.*, Rochester Comments at 13.

[348] TUECA Reply at 2-4 (adding that such a rule would prevent TUECA from obtaining any actual data on the price cap performance of either its own members or other similarly situated companies); USTA Reply at 35 (stating that this rule will unfairly limit the regulatory flexibility this Commission has traditionally extended to small LECs).

[348] We also note that, since those LECs subject to mandatory price cap regulation have, with minor exception, depooled all their affiliates, our all-or-nothing rule does not compel any company to depool.

[350] *Accord* NECA Supplemental Comments at 8; TDS Supplemental Reply at 7-8; Alltel Supplemental Comments at 5, 11.

[351] Smaller LECs that qualify as "average schedule" companies under §§ 69.605 and 69.606 of our Rules are eligible to use simpler, averaging mechanisms rather than actual cost accounting, to secure compensation for the services they provide. *See generally* Report and Order in the Matter of Average Schedule Companies, 103 FCC 2d 1017 (1986); *recon.* 3 FCC Rcd 834 (1987); *remand City of Brookings Municipal Telephone Co., et al. v. FCC*, 822 F.2d 1153 (1987); Revisions to the Average Schedules Proposed by NECA on October 3, 1988, 4 FCC Rcd 2804 (Com.Car.Bur. 1989).

[352] Cost companies, by contrast, are compensated on the basis of projected demand and costs, including the authorized rate of return, as reflected in individual or NECA tariff support materials.

[353] USTA Comments at 12; TDS Comments at 9; Alltel Comments at 7-10; NTCA Comments at 2; NECA Comments at 8; Michigan PSC Comments at 3-4. Michigan PSC contended that, in Michigan, a LEC holding company would have incentives to shift costs from a price cap affiliate to an average schedule affiliate because such a shift would enable the average schedule affiliate to show (improperly) lower interstate earnings and thereby secure higher intrastate rates to recover the difference. Michigan PSC Comments at 3-4. We note that Michigan's recently-adopted incentive regulation plan resolves this issue by removing the problem of cost-shifting incentives.

[354] *See, e.g.*, Alltel Comments at 7-10 (noting need for change in pooling rules to accommodate such an exception), 28-29. While Alltel agrees that average schedule companies should be exempted as discussed here, it argues that the *Second Further Notice* was mistaken in asserting that the all-or-nothing rule does not affect these companies, since an average schedule company that wished to elect price caps would have to convert to cost-based settlements before it could depool.

[355] USTA Comments at 12.

[356] *Second Further Notice*, 4 FCC Rcd at 3178 n.1350. *Accord* Alltel Comments at 7-8.

[357] *See* Section 61.41(a)(2) and (3) of the Rules. When a LEC withdraws from a pool, its cost and average schedule affiliates must also withdraw from the pool.

[358] *Alltel Corp. v. FCC*, 838 F.2d 551 (D.C. Cir. 1988). *See* Contel Comments at 6; Rochester Comments at 10-13; USTA Comments at 13-14; TDS Comments at 11; Alltel Comments at 21-22, 29-30; Alltel Reply at 17-18.

[359] Alltel Comments at 27-30 (arguing that the *Alltel* decision means that the Commission can never base requirements or regulatory decisions on a LEC's affiliation, and that the all-or-nothing rule is unreasonably discriminatory).

[360] Furthermore, we considered the existence of corporate barriers, regulatory restraints, and other asserted limitations on the ability of a holding company to shift costs improperly to an affiliate, and found that the record here reveals no adequate safeguards against improper cost shifting. Such limitations vary considerably from company to company and from state to state, and provide insufficient assurance against improper cost-shifting.

[361] New Section 61.41(c) of our Rules, in Appendix B herein. Since such merger transactions provide the companies involved with considerable flexibility, our rule applies equally to a non-price cap carrier acquiring a price cap carrier.

[362] Alltel Supplemental Reply at 6; Rochester Comments at 15 (arguing that any rule requiring a cost carrier to convert to price cap regulation will adversely affect the marketability of that carrier; also, absent unusual circumstances, any cost shifting between the two should not affect the profitability of either). *Accord* TDS Reply at 11 (stating that particularly when allocations are based on access lines or other neutral criteria, the likelihood of cost shifting is remote); Alltel Comments at 31 (claiming that little or no incentive exists to shift costs between merged or acquired carriers, and there is no evidence of actual cost shifting between such entities).

[363] Amendment of Part 69 of the Commission's Rules Relating to the Common Line Pool Status of Local Exchange Carriers Involved in Mergers or Acquisitions, CC Docket No. 89-2, 5 FCC Rcd 231 (1989).

[364] Consistent with the rules regarding initial participation in price cap regulation, we also exclude average schedule affiliates from the application of this price cap merger and acquistion rule. As the incentives to become more efficient are comparable for price cap carriers and average schedule companies, we find that these two types of carrier can co-exist in the same corporate organization.

[365] AT&T's tariff filings requirements are included in Part 61 of the Commission's Rules, 47 C.F.R. Part 61, along with the tariff rules for rate of return carriers.

[366] SNET argues that 60 days' notice is sufficient time to allow AT&T adequate opportunity to reflect proposed LEC access charges in its own subsequent annual price cap filing. SNET Comments at 24. We believe that the annual filings will be substantial, and that it is necessary that both the Commission and interested parties have adequate opportunity to review them fully. LECs will be required to include several adjustments in their annual filings, as discussed herein, and we believe the 90-day notice period is necessary to provide an adequate review. We accordingly reject the SNET proposal.

[367] *See, e.g.*, Ameritech Comments at 37-42; Pactel Comments at 43-44.

[368] *See, e.g.*, MCI Supplemental Comments at 41-43 (arguing that streamlined regulation is suitable only for non-dominant firms).

[369] DC PSC Comments at 18-19 (lesser degree of competition justifies a less stringent showing applicable to requests for suspension). *See also* MCI Comments at 69-71 (streamlined regulation is designed for carriers that lack market power). *Accord* Ohio PUC Comments at 6-7. *But see* Ameritech Comments at 41-42. Ameritech argues that the price cap plan we imposed on AT&T is a form of regulation which is necessary because AT&T does not face sufficient competition to prevent it from monopoly pricing of some services. The fact that the LECs face even less such competition, Ameritech says, should not affect the levels of scrutiny which we apply because, in both cases, our price cap mechanisms are directed to rates for noncompetitive services.

[370] MCI Comments at 71-72.

[371] MCI Comments at 69-71; NARUC Reply at 5-7 (proposed 5 percent upward and downward pricing flexibility in each service category is too great to prevent price discrimination). *But see* Contel Comments at 6-11 (place bands at the basket level for both switched traffic sensitive access and special access, to reflect the fact that ratepayers actually perceive these services as comprehensive packages).

[372] IDCMA Comments at 14-17; IDCMA Reply at 4-7 (excessive aggregation in our proposed standards would effectively divorce rate elements from underlying costs; need clear standards to relate costs to rate level changes in specific rate elements).

[373] We see no reason to impose special restrictions on non-recurring charges. Non-recurring charges must be paid by customers of all interexchange carriers when they change carriers or migrate to different services. On the information before us in this proceeding, we have no reason to believe that any one interexchange carrier or group of interexchange carriers is experiencing a disproportionate effect.

[374] Corporate Committee Supplemental Comments at 25 (suggesting that the Commission establish a mechanism that would enable potential petitioners to obtain service-specific cost data from the LECs when questions are raised regarding the lawfulness of the rates for individual access services).

[375] *See, e.g.*, IDCMA Comments at 16-17.

[376] Metropolitan Comments at 29-31 (asserting that the other types of available evidence we suggested in the *Second Further Notice*, such as successive rate increases, would be insufficient to protect competititors because these criteria are vague and rely too much on this Commission's discretion). *See also* Ad Hoc Comments at 15-19 (noting that our within- band proposal contains no definition of the current information that the LECs must produce, no pre-existing body of information against which that current information can be checked, no discovery procedures, and no indication that our staff will become actively involved in ferreting out the truth). *Accord* IDCMA Comments at 16-17.

[377] *See AT & T Price Cap Order*, 4 FCC Rcd at 3079, and *Second Further Notice* 3242-43, 3252-53.

[378] 47 C.F.R. § 1.773(a)(1)(iv). This section requires petitioners to demonstrate that: (1) there is a high probability the tariff will be found unlawful after investigation; (2) the suspension will not substantially harm other interested parties; (3) irreparable injury will result if the tariff filing is not suspended; and (4) suspension is not otherwise contrary to the public interest.

[379] For example, we could require additional information upon a showing that the LEC had under its exclusive control dispositive evidence of unreasonable rates. Persuasive evidence of several rate increases in succession for a particular service, discriminatorily high increases for certain services, or precipitous decreases having anticompetitive effect might also convince us that the carrier needed to supplement its original rate filing. *See AT & T Price Cap Order*, 4 FCC Rcd at 3099-3100 (para. 458).

[380] *See* Section V, *infra* ; *see also Second Further Notice*, 4 FCC Rcd at 3300-3305 (paras. 887-893).

[381] *Second Further Notice*, 4 FCC Rcd at 3255-56 (paras. 795-96).

[382] Ameritech Comments at 43 (stating that the notice period should be 45 days, with an option to extend it for another 45 days where necessary, because some tariff changes would not need the full 90 days); *accord* SNET Comments at 24; SNET Supplemental Comments at 25.

[383] CBT Comments at 18; *accord* SNET Reply at 16. CBT advocates instead that above-band increases should be evaluated under the present cost support requirements of Section 61.38 of our Rules.

[384] *See, e.g.*, NYNEX Reply at 32-33.

[385] USTA Comments at 31-32; *see also* Rochester Comments at 3 n.5.

[386] IDCMA Comments at 19. IDCMA contends that we should clarify whether the substantial cause test differs from our requirement of "some causal relationship" between the increased rate and increased costs. *See also* DC PSC Comments at 18-19 (citing *AT & T Price Cap Order* at 4 FCC Rcd at 3099 (para. 457) and arguing that the substantial cause test is more lenient than the present requirements under Part 69 of our rules, and that the relative absence of competition in LEC markets requires that we impose rigorous standards on the LECs under price caps to prevent them from disregarding the band limitations when it is in their interest to do so).

[387] Ad Hoc Comments at 19-21 (stating that, although our proposed standards would create some minor procedural requirements not currently imposed, there would be no well-defined, heightened substantive burden for such filings, and that the substantial cause standard is unacceptably vague, especially because we have eliminated the criterion of "unforeseeable costs" at the core of the concept and have attempted to replace it with nothing more than the vague criterion of "some causal relationship"); Ad Hoc Supplemental Comments at 22 n.15 (asserting that the substantial cause test will not provide an adequate degree of certainty that carriers will abide by the caps and bands).

[388] *See, e.g.*, NARUC Reply at 6 (stating that our proposed "streamlined" tariff review for above-band increases would result in cross-subsidization, especially because the bands are to be applied at the service category level of aggregation, rather than the rate element level).

[389] *AT & T Price Cap Order*, 4 FCC Rcd at 3101-03 (citing *RCA American Communications, Inc.*, 86 FCC 2d 1197 (1981)). The test was proposed for use ina LEC price cap system at *Second Further Notice*, 4 FCC Rcd at 3255-56 (paras. 795-96).

[390] For an explanation of the history of the substantial cause test, *see AT & T Price Cap Order*, 4 FCC Rcd at 3103-05 (paras. 466-75).

[391] When cost increases form the basis of a substantial cause showing, we would expect to see some causal relationship between the service bearing the increase and the costs which made the increase necessary, and an explanation of why the LEC is not attempting to raise the needed revenues through smaller, within-band increases to a wider range of services. In addition, LECs should be prepared to justify why a particular service or individual rate element has been singled out for the increase.

[392] *Second Further Notice*, 4 FCC Rcd 3256-58 (paras 797-802).

[393] SNET Supplemental Comments at 25 (arguing that a 45 day notice period is sufficient); CBT Comments at 18; *accord* SNET Reply at 16.

[394] US West Comments at 11-12.

[395] Ad Hoc Supplemental Comments at 22 n.15. *See also* Pactel Supplemental Comments at 34-35 (suggesting that the Commission require LECs to show either that the above-cap rate increase is "necessary to avoid unlawful confiscation of property, or necessary to ensure acceptable service quality").

[396] *AT &, T v. FCC*, 487 F.2d 865, 873 (2d Cir. 1973). *See also AT & T Price Cap Order*, 4 FCC Rcd 3300 (para. 887).

[397] *See* PRTC Reply at 31-32.

[398] Because of the limited purpose of above-cap filings - to avoid confiscating rate levels - we will employ a scrupulous review procedure to ensure that no LEC can benefit unfairly (*i.e.*, earn above a reasonable level) as a consequence of an above-cap rate.

[399] Several small and mid-size LECs respond favorably to our suggestion that small companies should be held to a lesser burden for above-cap increases, and some of them cite a similar need for midsize companies. TDS Comments at 13-14; TDS Supplemental Reply at 10 (advocating streamlined procedures for the above-cap filings of small LECs, on the grounds that this added flexibility would help persuade small LECs to elect price caps). These parties recommend various criteria and mechanisms to mitigate the burden on smaller companies for above-cap filings, and cite various reasons for this differential treatment, including smaller companies' lesser ability to attract capital, maintain service quality, implement technological upgrades, avert bypass by major customers, and make detailed element-by-element showings to this Commission. USTA Comments at 32-33 (small and mid-size LECs should be required only to provide their most recent cost and demand data); PRTC Comments at 42-44; SBA Comments at 34-35; Lincoln Comments at 7-8; OPASTCO Comments at 17-18. As noted in the next section (E. Small company issues), we propose to conduct further proceedings to consider the concerns of smaller LECs

with regard to price caps. In the meantime, if these companies perceive problems in these areas, they need not elect price cap regulation.

[400] In those rare instances, if any, in which above-cap filings are found to be lawful, the carrier involved would not be able to take advantage of our rules regarding increased profits under the sharing mechanism. That is, such a carrier would become subject again to the unitary rate of return. We will deal with the future regulatory treatment of these carriers on a case-by-case basis, either as part of the tariff process or in a subsequent enforcement action.

[401] *Second Further Notice*, 4 FCC Rcd at 3258-59 (paras. 803-05).

[402] *Id.* at 3259 (para. 805).

[403] SWB Comments at 8 n.10 (stating that the LECs should not have to compute and submit such information to this Commission on a routine basis); US West Comments at 41-42; SNET Reply at 16. *See also* Executive Agencies Comments at 16 (favoring incremental cost over average variable cost). *Accord* SWB Comments at 8.

[404] Ameritech Comments at 43-44; Bell Atlantic Comments at 6 (stating that the effect is to deprive consumers of reductions and to protect competitors from rigorous competition). Bell Atlantic apparently means that if a proposed rate reduction still manages to cover average variable cost, it should not only become effective without suspension, but also be found lawful on the merits.

[405] BellSouth Comments at 27-29; Pactel Comments at 30-33.

[406] Local Telecom Supplemental Reply at 5, citing *McGhee v. Northern Propane Gas Company*, 858 F.2d 1487, 1503 (11th Cir. 1988): ("If a defendant's prices were below average total cost and above short run marginal cost, then there is circumstantial evidence of predatory intent.")

[407] Local Telecom Supplemental Reply at 5-6 (stating that the average variable cost standard would prove troublesome for LEC services). *Accord* D.C. People's Counsel Supplemental Reply at 8 (stating a concern that revenues would not cover the total cost of providing service and that the LECs would shift these costs, through higher prices for monopoly services, to captive ratepayers). *See also* Ohio PUC Comments at 7-8 (arguing that the only possible explanation for prices below average variable cost is predatory pricing).

[408] MCI Comments at 61-62 (*citing Instruction Systems Dev. Corp. v. Aetna Casualty & Surety Co.*, 817 F.2d 639, 648 (10th Cir. 1987) and *MCI v. AT & T*, 708 F.2d 1081, 1119-1120 (7th Cir. 1983)).

[409] Metropolitan Reply at 18-21.

[410] *See* Areeda & D. Turner, Antitrust Law (1978) ¶ 711; R. Koller, *The Myth of Predatory Pricing: An Empirical Study*, 4 Antitrust L. & Econ. Rev. 105 (1971); *see generally* J. Kwoka & L. White, The Antitrust Revolution (1989).

[411] *See Cargill Inc. v. Monfort of Colorado*, 469 U.S. 104, 117 n. 12 (1986), *comparing Arthur S. Langenderfer, Inc. v. S. E. Johnson Co.*, 728 F.2d, 1050, 1056-57 (6th Cir.) *cert. denied*, 469 U.S. 1036 (1984), *with Transamerica Computer Co. v. International Business Machines Corp.*, 698 F.2d 1377 (9th Cir.), *cert. denied*, 464 U.S. 955 (1983).

[412] *Second Further Notice*, 4 FCC Rcd at 3264-68, (paras. 820-26) *citing AT & T Price Cap Order*, 4 FCC Rcd at 3122-29 (paras. 518-34).

[413] Metropolitan Comments at 32 (arguing that the distinctions drawn in the *Second Further Notice* between new services and restructured services are vague and unenforceable, and citing as an example, whether BSEs will be treated as new or restructured services); Networks Comments at 7 n.9 (stating that digital television service should be considered "new," as it will be provisioned differently than analog service, and can share fiber optic cable with other services such as associated voice and data coordination circuits).

[414] GTOC Comments at 37 (urging that we modify the Part 69 rules to permit the introduction of new services, since the new-restructured distinction has little meaning to LECs if waivers of the Part 69 rules are required every time a LEC seeks to introduce a new service); Hawaii Comments at 21 (arguing that we must monitor the introduction of new and restructured services to ensure that they are not introduced in a discriminatory fashion, and asserting that carriers have been slow in bringing innovative new and restructured offerings to Hawaii).

[415] *Second Further Notice*, 4 FCC Rcd at 3265-66 (paras. 821-23). The Commission proposed that incorporation of new services would occur at the first annual filing after completion of the base period in which the service was introduced. The Commission suggested that the limited delay in incorporating new services was necessary to develop the historical demand data that the actual price index and the service band index require.

[416] *Id.* The net revenue test is as follows: (1) the proposed service and each unbundled element thereof must increase net revenue; (2) the increase in net revenue must occur in the lesser of 24 months from the time the service is incorporated into the indexes or 36 months from the date the new service is introduced; (3) net revenue shall be measured on a present value basis; (4) detailed information must be provided on demand, cost, revenues, elasticity, and cross-elasticity of demand associated with the new service; (5) assumptions, estimates, and cost allocation methods shall be explained; (6) beginning six months after introduction of the new service, LECs must file quarterly reports comparing actual operating results with the net revenue projections.

[417] Ameritech Comments at 35 (asserting that the potential for short term profit is what drives the industry to undertake costly innovations, and as competitors introduce similar services, prices will tend to move downward). *Accord* SWB Comments at 9. *See also* NYNEX Comments at 27-28; NYNEX Reply at 34 (adding that services introduced on or before April 1, 1989, should be included in the initial price cap filing).

[418] USTA Comments at 33; Pactel Comments at 20-21; CBT Comments at 17 (arguing that new services generally have small customer demand and insufficient revenues to justify the cost of a quarterly reporting system); United Comments at 13 (arguing that quarterly reporting could be required in specific cases, if necessary). *But see* NYNEX Reply at 33-34 (supporting the quarterly reporting requirement).

[419] Metropolitan Comments at 33-35. *Accord* Local Telecom Reply at 7-8. Metropolitan would also postpone incorporation of new service rates into price caps until the new service is generating a positive net revenue. Metropolitan Reply at 28.

[420] *See, e.g.*, NYNEX Reply at 33-34.

[421] Executive Agencies Comments at 20. Executive Agencies suggests that the upper band "reflect" the current facilities costs, including overhead. For the lower band, Executive Agencies suggest we employ an incremental cost standard, as average variable cost would yield a lower band that is too high. Executive Agencies would also review rates every two years.

[422] USTA Comments at 34-35, 37; USTA Reply at 34-35; SNET Reply at 17.

[423] GTOC Comments at 36-37 (arguing that the test should be applied to the overall "product level," thus significantly reducing the amount of supporting data required). *But see* Executive

Agencies Reply at 7-8 (stating that GTOC's approach provides too little information about whether the new service is being priced in an anticompetitive way, at rates that subsidize other services).

[424] Pactel Comments at 22-23 (requesting clarification of waiver requirements to include situations in which payback would be "impracticable" in stated period because service is brand new, and LEC must create a market). *Accord* PRTC Reply at 60-61; United Comments at 12-13 (requesting a 48-month payback period for all new services); *accord* SNET Reply at 17.

[425] Metropolitan Comments at 34; Metropolitan Reply at 26-27; Local Telecom Reply at 7-8 (stating that this will result in streamlined treatment of noncompensatory rates for a period of up to three years); DC PSC Reply at 3-4 (suggesting instead that we discount the positive present value at a prospective cost of capital that reflects the risk involved in offering an untried service).

[426] *See, e.g.*, Ameritech Comments at 34-35 (arguing that a presumption of reasonableness should attach to new service filings); BellSouth Comments at 33-34 (proposing a 14-day period); *accord* PRTC Reply at 60-61. *But see* SNET Comments at 24 (supporting 45 days' notice for new services).

[427] Metropolitan Reply at 25-26. *Accord* Local Telecom Reply at 7-8.

[428] Because we are not requiring price cap regulation for any small or mid-size LEC, we do not believe it is necessary now to create a different standard for such companies. The reporting requirement established here is one factor that such a LEC will consider in deciding whether to elect price cap regulation.

[429] *Second Further Notice*, 4 FCC Rcd at 3267-68 (paras. 825-26).

[430] SWB Comments at 9.

[431] *See, e.g.*, GTOC Comments at 36 (arguing that the net revenue standard ought to be applied to restructured offerings).

[432] Metropolitan Comments at 36-37; *accord* Local Telecom Comments at 5.

[433] Executive Agencies Comments at 20.

[434] PRTC Reply at 60-61; BellSouth Comments at 33-34 (urging 14 day notice period, with reliance on the Commission's suspension powers to extend the period of review if a tariff presents public interest concerns).

[435] Metropolitan Reply at 25-26; Local Telecom Reply at 7-8.

[436] For a description of these programs *see Second Further Notice*, 4 FCC Rcd at 3273-75 (para. 834 and accompanying footnotes).

[437] *Id.* at 3269-70 (para. 828).

[438] *See* Section 69.612(a) of the Commission's Rules, 47 C.F.R. § 69.612(a).

[439] NECA Supplemental Comments at 3-6.

[440] USTA Supplemental Reply at 21-22; Alltel Supplemental Reply at 12; NTCA Supplemental Reply at 1-6; SNET Supplemental Comments at 25-26.

[441] NTCA Supplemental Reply at 3-6.

[442] AT&T Supplemental Reply at 20 n.**.

[443] AT&T Ex Parte Presentation by Joel E. Lubin, September 12, 1990.

[444] *See, e.g., Second Further Notice*, 4 FCC Rcd at 3130, 3279-82.

[445] NTCA Supplemental Comments at 8-9; Hawaii Supplemental Comments at 6-12; Alaska Supplemental Reply; BellSouth Supplemental Reply at 42-44.

[446] We find no merit, however, in the generalized claim by MCI that "the Commission should investigate the existing subsidy mechanisms and determine whether they will continue to be viable under incentive regulation." MCI Supplemental Comments at 18-19. MCI has had several opportunities in this proceeding and others to present any specific proposals for revisions to the rules governing these programs, under both current regulation and price caps. MCI presents no substantial arguments based on its objections to these separate programs, such as would justify delay in the price cap plan.

[447] *See, e.g.*, SNET Supplemental Comments at 24; NYNEX Supplemental Reply at 30; Centel Supplemental Comments at 2; Pactel Supplemental Reply at 11-12; United Supplemental Reply at 12-13; USTA Supplemental Reply at 22-23.

[448] *See, e.g.*, Hawaii Comments at 10-11; NARUC Reply at 7; TCA Comments at 6-7; DC PSC Comments at 9; Missouri Comments at 4; NCTA Reply, Besen Statement at 8-11; Indiana UCC Comments at 17-18; Indiana UCC Reply at 7-8; Joint Parties Supplemental Comments at 3-4; Ad Hoc Supplemental Comments at 29; Corporate Committee Supplemental Comments at 14-15; TCA Supplemental Comments at 16-18; Executive Agencies Supplemental Reply at 9.

[449] *Further Notice*, 3 FCC Rcd at 3265-66 (paras. 134-136); *Second Further Notice*, 4 FCC Rcd at 3160-63 (paras. 593-604).

[450] Commenters' concerns arise from the fact that price cap regulation departs from the encouragement fostered under rate of return regulation to "gold-plate" the network. We are aware of, and concerned by, this shift, as well.

[451] The three-second standard is an example of an industry-developed service parameter. This time limit was not developed or imposed by this Commission or any regulatory agency; rather, it evolved through industry practice and self-monitoring before divestiture, and is broadly accepted now.

[452] Bell Atlantic reports all four transmission quality components, but some companies report the percent of measured central offices meeting only one or two of the key criteria. Pacific Bell has so far provided no transmission quality reporting.

[453] *See* Update on Quality of Service for the Bell Operating Companies, Industry Analysis Division Report, June 1990, at 4-5.

[454] The companies have been fairly consistent in their reporting procedures, but the measurement reflects the date promised to the customer for a service order, and is not uniform across companies. In addition, the categorization of service calls varies among carriers. But for purposes of summarizing these reports, a standard format is used.

[455] While we conclude that we will not set specific standards at this time, we do intend that the carriers use, as much as possible, the same units of measure, the same classifications of services, and the same reporting formats. Efforts have been made informally to achieve higher levels of uniformity in the format and bases of these reports, and summary information is presented uniformly for all companies. The reports continue to rely, however, on standards established by individual carriers. Also, in some cases data underlying the reports is categorized or aggregated differently. We direct the Chief, Common Carrier Bureau to make every effort, in the course of its proceedings to develop reporting requirements and formats, to promote uniformity among the LECs regarding classification of services, establishment of intervals, units of measurement, establishment of standards, and other reporting factors.

[456] This desire for uniformity applies as well to those measurements included in the quarterly reports, discussed below, that rely on carrier-established standards.

[457] Although most LECs state that reporting requirements of the sort developed by BellSouth and Rochester would not be burdensome, some smaller LECs say that these requirements would impose a substantial administrative burden, and that non-BOC LECs should be free of the BellSouth/Rochester reporting requirements. In view of our eligibility determinations, we need not consider these arguments, since we are not imposing this reporting requirement on any LECs other than GTOC and the BOCs. The reporting requirement is one of several factors that will be considered by a LEC in its deliberations about electing price cap regulation, and the burden of reporting can be balanced against the substantial potential benefits.

[458] Network blockage reports apply to Feature Groups C and D only.

[459] We believe that keeping these reports in the modified BellSouth/Rochester plan will make them more useful that they would be in the semi-annual report. First, the reports will be filed quarterly (at least for the initial two-year period) rather than semi-annually. Second, they will be compiled and filed on a study area basis rather than on a tariff entity basis. The BellSouth/Rochester report's requirement of complaints per thousand lines is eliminated. This reporting is superfluous, in view of our Enforcement Division's internal tracking procedures.

[460] Some commenters are opposed in principle to allowing the LECs to design their own service quality standards, if we adopt the RBOC reports (originally designed to gather information already compiled by the RBOCs for their own purposes) and the proposal of BellSouth and Rochester Telephone. Ad Hoc Comments at 43-44; Hawaii Comments at 10-11. We believe that the reporting requirements, as expanded and modified here, adequately acknowledge and address commenters' concerns in this regard.

[461] Several commenters object to the inclusion, without discussion or justification, of these three additional reporting categories. SNET Supplemental Comments at 22; USTA Supplemental Comments at 41-42. We believe, however, that this latest round of comments has offered all parties reasonable opportunity to comment on the inclusion of these reporting categories, and that our discussion herein justifies these requirements.

[462] *See, e.g.*, SNET Supplemental Comments at 22-24; CSE Supplemental Reply at 7.

[463] Ad Hoc Supplemental Comments at 33-34; TCA Supplemental Comments at 17-18. Metropolitan and OPASTCO suggest the addition of a reporting requirement on the quality of connections; Ad Hoc and TCA urge the inclusion of still other reporting categories. Boeing Computer asserts that even detailed reporting will not keep the FCC apprised of how LEC infrastructure development compares to that undertaken in other industrialized countries, so the Commission should work with the user community to develop appropriate quality standards and monitoring programs.

[464] PDD is also known as "access time." Provision of Access Service, 4 FCC Rcd 2824, 2840 & n.26 (1989).

[465] The LECs argue that various factors (including interexchange carrier service, customer premises equipment configuration, and calling patterns) affect PDD. They also assert that they do not have the ability to monitor PDD, and that to do so would be costly, labor-intensive, and burdensome. Further, they state, the resulting data would be meaningless, since so many factors are more determinative of PDD than the sending LEC's service quality. Finally, they state that no discussion or justification of this or the other additional categories has yet been provided. SNET Supplemental Comments at 23; USTA Supplemental Comments at 42-43.

[466] *See, e.g.*, Bell Atlantic Comments at 13-14; BellSouth Comments at 40.

[467] BellSouth Comments at 41; NYNEX Comments at 11-12; SWB Comments at 30; USTA Comments at 7.

[468] Rochester Comments at 21-22; USTA Comments at 7-8; BellSouth Comments at 40-41; SNET Supplemental Comments at 22-24; USTA Supplemental Comments at 41-43; CSE Supplemental Reply at 7.

[469] SNET Supplemental Comments at 22-23.

[470] All of the supporting LECs argue for modification of our category proposal, limiting reporting to a per-incident basis, to service affecting outages, and to outages with a minimum duration of two minutes. NYNEX Comments at 10-11; SWB Comments at 26-27; US West Comments at 23 n.76; United Comments at 9; Pactel Comments at 52; USTA Comments at 9; CBT Comments at 15; Rochester Comments at 21.

[471] BellSouth Comments at 41.

[472] SNET Comments at 22.

[473] SNET Supplemental Comments at 22-24.

[474] *See, e.g.*, NARUC Reply at 8; Illinois Reply at 18; NY DPS Comments at 10.

[475] Metropolitan Supplemental Reply at 8-9; OPASTCO Supplemental Comments at 2.

[476] *See* Public Notice, Metropolitan Fiber Systems Petition for Rule Making on Interconnection of Competitive Carrier Access Facilities, RM-7249, DA 90-132, released Feb. 2, 1990.

[477] TCA Supplemental Comments at 17; Boeing Computer Supplemental Comments at 10; TCA Supplemental Reply at 10-11, 14.

[478] We required the BOCs to file these reports; GTOC provided the data on its own initiative. *See* Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, CC Docket No. 89-624, 5 FCC Rcd 543 (Com.Car.Bur. 1990) (*Data Request)* ; 5 FCC Rcd 892 (Com.Car.Bur. 1990) (modifying and clarifying the *Data Request)*.

[479] We are less concerned with collecting this data from smaller LECs that might elect price caps, because we believe that infrastructure monitoring of the largest eight LECs will provide a good indication of the general state of the infrastructure nationwide. We are also reluctant to create reporting requirements that might be more burdensome for smaller carriers, and might preclude their participation in price cap regulation. If we have indications that LECs electing price caps are failing to maintain and improve their network, however, we will revisit this issue. As we have done with the other service quality reports, we delegate the responsibility for implementing this filing requirement to the Chief, Common Carrier Bureau.

[480] Centel Supplemental Reply at 2-4. CSE suggests that when LECs introduce technological improvements or enhancements to consumer telephone service, the Commission should adjust the price cap index to account for a quality change. CSE Supplemental Reply at 8-9. By keeping the index low as these services become increasingly available, this commenter asserts, the Commission would encourage companies to make technological changes that benefit customers. *Id.*

[481] Ad Hoc Supplemental Comments at 34; Corporate Committee Supplemental Comments at 17; SWB Supplemental Comments at 15-16; Aeronatical Radio Supplemental Reply at 9-11. Ad Hoc and Aeronautical Radio contend that the Commission must establish standards to assess LEC investment levels.

TCA suggests that the Commission use a sharing mechanism to ensure network investment, noting that some state regulators have implemented sharing plans that include a network investment component. TCA Supplemental Reply at 10-11; TCA Supplemental Comments at 5, 16-18.

[482] NYNEX Supplemental Reply, Att. 2.

[483] While these technical references do not establish specific standards of acceptable service quality, they do provide a uniform definition of service upon which comparisons can be based.

[484] *See* Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67, and 69 of the FCC's Rules), CC Docket No. 86-182, Report and Order, 2 FCC Rcd 5770 (1987) (*ARMIS Order*) ; *recon.*, 3 FCC Rcd 6375 (1988). The ARMIS reports are fully automated, and the system can cross-check columns and rows to ensure an internally consistent report that is also consistent over time.

[485] Further, the ARMIS quarterly report includes Table III, consisting of non-financial data such as premium and non-premium minutes of use, and number of access lines in service.

[486] Many manifestations of service quality decline, such as increases in blockage, PDD, noise, and time to complete installations or repairs, are easily detectable by ratepayers.

[487] Several commenters, including state commissions and NARUC, support the development of such standards, and argue that they are necessary to ensure that service quality remains high, and that service quality levels are constant across geographic areas, among urban and rural communities, and across different classes of customers. Aeronautical Radio Supplemental Comments at 11; Hawaii Supplemental Comments at 19; Iowa Comments at 10; NARUC Reply at 8-9. These commenters suggest formation of a task force, a state-federal joint board, or some other body to develop these standards. NARUC Reply at 8-9; Ohio PUC Reply at 3-4. Other commenters, including the LECs generally, argue that no specific standards are necessary, for the reasons stated in our *Second Further Notice*. *See* USTA Reply at 10; NYNEX Supplemental Reply at 12; United Supplemental Reply at 12-13. Some of the LECs argue that the service quality standards already present in interstate tariffs, and those established and enforced by state commissions, are sufficient, and that the Commission need not develop or impose additional standards.

[488] *See, e.g.*, Boeing Computer Supplemental Comments at 9-11; Hawaii Supplemental Reply at 12-13. In order for these reports to indicate any diminishing of service quality, these commenters assert, the service quality breakdown would have to be broadbased and almost absolute.

[489] *See, e.g.*, Boeing Computer Supplemental Comments at 11 (suggesting disaggregation at the service category and geographic subdivision level to prevent masking problems in a single service or locale).

[490] Hawaii argues that the reporting level must be even lower, or there will be incentives to discriminate among groups of customers or between geographic locations. Hawaii Reply at 20; Hawaii Supplemental Reply at 12-13. LECs argue that LATA-level reporting would be onerous and burdensome, and would provide no balancing benefit. NYNEX Reply at 30; SWB Comments at 49-50.

[491] Boeing Computer Supplemental Comments at 11; *see also* Corporate Committee Supplemental Comments at 16.

[492] The semi-annual service quality reports are prepared at a filed-tariff level; ARMIS reports, including the BellSouth/Rochester, switch downtime, and PDD reports added here, are on a study area level, as are the newly-added infrastructure reports.

[493] Another related issue, the availability of our service quality data to state commissions and other interested parties, is discussed in part "C. Other monitoring and performance review," *infra*.

[494] Boeing Computer Supplemental Comments at 11 (arguing that reporting that fails to distinguish between switched and special will reveal only the most general of information or the most drastic of trends); Hawaii Supplemental Comments at 19; TCA Supplemental Comments at 17 (contending that reporting must segregate switched and special in order to minimize LECs' ability to migrate customers). Some commenters suggest that reports should be written for specific services within access categories. *See, e.g.*, TCA Supplemental Comments at 17. Other parties oppose such disaggregation on the grounds that there is little plant that is dedicated to a single service, so that such disaggregation would be burdensome, and would not provide useful information. NYNEX Reply at 30; SWB Comments at 49-50; SNET Supplemental Comments at 24.

[495] We do not see the need for reporting on a per-service level within access categories. Such a requirement would add substantially to the reporting burden, and would not likely provide any consensus on format or definition.

[496] *See, e.g.*, SNET Supplemental Comments at 24.

[497] For example, some commenters discuss with approval Rochester Telephone's settlement with the New York DPS, which includes a requirement that the company refund to customers 1/2 of one percent of its monopoly revenues if it does not meet certain service quality standards. NY DPS Supplemental Comments at 8; Hawaii Supplemental Reply at 13; NYNEX Supplemental Reply at 29-30; Executive Agencies Supplemental Reply at 9-10. The workability of such an enforcement provision disappears with the conclusion that we will not establish specific federal service quality standards. Similarly, some commenters assert that the Commission must inform the LECs that they will not be permitted to keep the "savings" that would result if they allow service quality to decline, but that their rates will be adjusted downward to reflect inferior service. Ad Hoc Supplemental Comments at 34; Hawaii Supplemental Reply at 12-13; TCA Supplemental Comments at 18. This suggestion, as well as suggestions of independent testing programs and imposition of penalties, all disappear as options with our decision not to develop specific standards.

[498] Corporate Committee Supplemental Comments at 24-25; Boeing Computer Supplemental Comments at 9-10, 12; Ad Hoc Supplemental Comments at 30-32.

[499] Centel Supplemental Comments at 7-10; Aeronautical Radio Supplemental Comments at 11; TCA Supplemental Comments at 16, 18.

[500] The state commissions have, as might be anticipated, a much closer involvement in LEC operations, and knowledge of the needs and requirements of the specific populations served, than we have. In many cases, the network improvements or investments required by state regulators have been developed as part of a negotiated agreement with the LEC in question. For example, SWB in New Mexico will develop a network connecting all of that state's universities and community colleges; Pacific Bell in California will invest $404 million to digitize its network by 1992.

[501] *See, e.g.*, USTA Comments at 6, 36-37; Contel Comments at 19-21; Lincoln Comments at 8-9; SNET Comments at 19. According to these commenters, LECs that elect price cap regulation should be exempt from any new service monitoring plan, but should be allowed to meet FCC reporting requirements by submitting copies of any reports required by their state commissions.

[502] We note that we take a different approach with regard to infrastructure data reports. While we conclude here that no exemption from service quality reporting can be justified for LECs electing price caps, we concluded with regard to the infrastructure data collection that such reporting would be especially burdensome for smaller LECs, and that data collected from the eight largest LECs would provide an adequate indication of the general state of the infrastructure nationwide. *See* discussion on infrastructure development at III.A.3., *supra*.

[503] The Commission has previously stated that "[t]he possibility of cost shifting . . . is inherent in a bifurcated regulatory system." *Second Further Notice*, 4 FCC Rcd at 3167 (para. 610). But the Notice tentatively concluded that "the combination of ARMIS, the separations rules, and state monitoring will be effective in identifying and correcting the misallocation of costs to either the state or the interstate jurisdiction." *Id.*

[504] *See* MTS and WATS Market Structure, Amendments to Part 67 (New Part 36) of the Commission's Rules and Establishment of a Federal-State Joint Board, CC Docket Nos. 78-72 and 86-271, Report and Order, 2 FCC Rcd 2639 (1987); Reconsideration and Supplemental Notice of Proposed Rule Making, 2 FCC Rcd 5349 (1987); Reconsideration and Supplemental Notice of Proposed Rule Making, 3 FCC Rcd 5518 (1988).

[505] Part 36 procedures rely on the concept of the separability of telecommunications plant to interstate and intrastate use. Telecommunications plant, in general, is segregable into two broad classifications, namely, (i) interexchange plant (including operator systems, switching plant, and trunk transmission equipment), which is plant used primarily to furnish toll services; and (ii) exchange plant (including operator systems, switching plant, trunk equipment and subscriber plant), which is plant used primarily to furnish local services. *See* 47 C.F.R. §36.2.

[506] *See* 47 C.F.R. §36.1(a). Part (c) of §36.1 states:

> The fundamental basis on which separations are made is the use of telecommunications plant in each of the operations. The first step is the assignment of the cost of the plant to categories. The basis for making this assignment is the identification of the plant assignable to each category and the determination of the cost of the plant so identified. The second step is the apportionment of the cost of the plant in each category among the operations by direct assignment where possible, and all remaining costs are assigned by the application of appropriate use factors.

Data on plant in service and gross plant additions are reported in the ARMIS filings. The separations rules, like the ARMIS and other reporting requirements, specify use of the Uniform System of Accounts (USOA).

[507] 47 C.F.R. §36.1(g).

[508] *See* Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67, and 69 of the FCC's Rules), CC Docket No. 86-182, Report and Order, 2 FCC Rcd 5770 (1987) (*ARMIS Order)* ; *recon.*, 3 FCC Rcd 6375 (1988).

[509] The annual ARMIS reports also include forecasts of regulated and nonregulated usage and costs for each cost pool as required in the *Joint Cost Order*, company-wide data for each account specified in the USOA, and a study area report containing data for each revenue requirement related account specified in the USOA. ARMIS also includes a quarterly report, which contains in summary form the data needed to monitor revenue requirements, rate of return, jurisdictional separations, and access charges. The LECs' Tariff Review Plans (TRPs) are not formally a part of the ARMIS system, but are generally included in the annual ARMIS filing and incorporated in the ARMIS data bank. The Common Carrier Bureau recently adopted revisions to the ARMIS Quarterly Report which further strengthen the Commission's monitoring of jurisdictional allocations. Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies, CC Docket No. 86-182, 5 FCC Rcd 4718 (Com.Car.Bur. 1990).

[510] *See ARMIS Order*, 2 FCC Rcd at 5770.

[511] Maryland PC Comments at 7-8. *See also* Alabama PSC Comments at 3.

[512] In the *ARMIS Order* the Commission determined that LECs' fears of competitive disadvantage with regard to automated reporting were overstated, and that the existing rules regarding confidential treatment of proprietary information are adequate. We believe that several factors, most especially the level of aggregation of data for ARMIS reporting, preclude competitors' use of most of this data to harm LECs.

[513] *See* Feb. 10, 1989, Letter from Chief, Common Carrier Bureau, to Frank Krogh, MCI, FOIA Control No. 80-15; Nov. 7, 1989, Letter from Deputy Chief, Common Carrier Bureau, to Paul Rodgers, NARUC, FOIA Control No. 89-151. In these two determinations, the Bureau concluded that almost all ARMIS data is so aggregated as to ensure that its release offers no competitive advantage to LEC competitors. The Bureau did determine, however, that the RBOCs were justified in withholding usage forecasts for nonregulated ventures, as competitively significant. Both cases allowed confidential treatment only of data contained in the RBOCs' ARMIS Report 495(A), a three-year forecast of usage.

[514] *See, e.g.*, W. Virginia PSC Comments at 1; Maryland PC Comments at 7-8 (arguing that the Commission should make ARMIS data more available by clarifying and minimizing LECs' reliance on confidentiality); Alabama PSC Comments at 3. As noted above, we consider ARMIS reports to be freely and generally available to the public, with the possible exception of the Report 495(a) usage forecasts.

[515] Among these are New York, Nebraska, California, and Michigan. Many other states, including Alabama, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Kansas, Maine, Maryland, Minnesota, Missouri, Nevada, New Jersey, Rhode Island, Vermont, Washington, West Virginia, and Wisconsin have developed regulatory approaches similar to our federal plan.

[516] Service quality monitoring is discussed in section III. A. on service quality, *supra*. Monitoring of jurisdictional allocations is discussed in section III. B., *supra*.

[517] BellSouth Comments at 34-37; Pactel Comments at 44; USTA Comments at 39.

[518] Ad Hoc Comments at 43-44; Ad Hoc Supplemental Comments at 27-28; ICA Supplemental Comments at 3, 7; Ad Hoc Supplemental Reply and ICA Supplemental Reply, ETI Report at 2 (arguing that ARMIS reports are necessary, but not sufficient, as they were not designed to evaluate price caps).

[519] Ad Hoc also objects that among all our data collections, there is nothing that provides analysis of the economic reasonableness of LEC investment decisions, or on LECs' investment of excess earnings in new ventures. Ad Hoc Supplemental Comments and ICA Supplemental Comments, ETI Report at 31-32.

[520] Ad Hoc Comments at 45-46 and ETI Report at 39-40. We reject the assertion that the ARMIS computerized data base is not yet developed. ARMIS has been in effect for more than two years, and has proved to be a reliable and usable data collection.

[521] *See, e.g.*, Ad Hoc Comments at 27, 43-46. We have discussed and resolved the question of confidentiality of ARMIS reports in our section on service quality monitoring, *supra*.

[522] Ad Hoc Comments and ICA Comments, ETI Report at 34-39 (arguing also that the Commission's staff and analytical resources are inadequate to the task of monitoring price cap carriers); *see also* Local Telecom Comments at 11-12. Ad Hoc recommends that instead of the existing and proposed monitoring plan, we use a forecast plan similar to that developed in Vermont, under which LECs would submit well-defined data to compare to meaningful standards of carrier performance. Ad Hoc Comments at 27-28. We reject this suggestion.

[523] ARMIS includes the following reports: the quarterly report, 43-01; the USOA report, 43-02; the joint costs report, 43-03; the jurisdictional separations report, 43-04; the three-year investment usage forecast report, 495A; the three-year investment actuals report, 495B; and the LEC tariff review plans (TRPs).

[524] The quarterly report, 43-01, will be expanded by the addition of new service quality reporting requirements, as discussed above. The 43-01 report presently consists of three tables: Table I, Costs and Revenues, includes total, non-regulated, shared network facilities agreements (SNFA) and intra-company adjustments, all other adjustments, subject to separations, state, interstate, common line (which is broken into pay phone, inside wire, base factor portion, and total), traffic sensitive (containing switching, equal access, transport, information, and total), special access, total access, billing and collection, and interexchange. Table II, Demand Analysis, includes minutes of use (MOU) for common line premium and non-premium originating and terminating, and for switched traffic sensitive; line counts for common line demand for single line business, residence lifeline, residence non-lifeline, multiline business, and special access lines subject to surcharge. Table III, Restated Data, contains data for current quarter, monitoring period to date, and previous monitoring period, for rows listed in Table I, for Subject to Separations, Interstate Access, Common Line, Traffic Sensitive, and Special Access.

[525] Report 43-02 includes company-wide data for each account specified in the USOA, a study area report containing data for each revenue requirement related account specified in the USOA.

[526] Report 43-03 includes forecasts of regulated and nonregulated usage and costs for each cost pool as required in the *Joint Cost Order*. Separation of Costs of Regulated Telephone SErvice from Costs of Nonregulated Activities, CC Docket No. 86-111, 2 FCC Rcd 1298 (1987) (*Joint Cost Order*).

[527] Report 43-04 includes a study area report containing jurisdictional separations and interstate access results for each category specified in Parts 36 and 69 of the Commission's rules.

[528] *See, e.g.*, United Comments at 5-7 (arguing that it is unnecessary and perhaps improper to collect data on the element and subelement level, that Reports 43-02 and 43-03 give enough detail to monitor allocations of regulated and nonregulated costs. To monitor price-regulated LEC activity, United argues, the Commission needs only total company, total state, and total interstate data); SNET Supplemental Comments at 24-25.

[529] United also argues that individual case basis (ICB) reporting requirements should be reduced whenever the ICB offerings amount to no more than 1 percent of the LEC's interstate revenues. United Comments at 5-6.

[530] *See, e.g.*, SNET Supplemental Comments at 24-25; United Supplemental Comments at 5-6.

[531] *See, e.g.*, SWB Supplemental Reply at 2.

[532] The ARMIS changes effected in a recent Common Carrier Bureau order are merely adjustments that further enhance our ability to monitor LEC activities that are discussed as concerns here. *See* Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67, and 69 of the FCC's Rules), CC Docket No. 86-182, Order, DA 90-959, released July 20, 1990.

[533] Many LEC commenters urge us to eliminate all earnings indicators from our monitoring and performance review; other commenters urge us to increase the use of such data. Some parties suggest that our monitoring program is inadequate absent some parallel cost of service checks on the initial LEC price cap plan, and urge us to retain rate of return regulation, in tandem with price cap regulation, to provide a basis of comparison and evaluation. *See, e.g.*, Ad Hoc Supplemental Comments, ICA Supplemental Comments, ETI Report at 2 (discussing the uncertain assumptions upon which plan is based, such as productivity factor, plus pricing flexibility and potential for strategic pricing). NARUC urges us to adopt such an approach, at least for some initial period of price cap implementation. NARUC Letter, from Deputy Assistant General Counsel Andre J. Lachance to Secretary, FCC, Aug. 22, 1989 (supporting Congressional proposal that would require this Commission to monitor LECs under rate of return principles, as well as under price cap principles). NARUC summarizes the Congressional proposal as requiring: (1) a comparison of price cap rates and the rates that would have occurred under rate of return; (2) a report on price cap carriers' rates of return; and (3) an analysis by the General Accounting Office of Commission data to review the effects of price cap regulation on residential telephone usage, competition in the interexchange market, and services and rates available to rural subscribers.

[534] *See* new Section 69.1(c), 47 C.F.R. § 69.1(c), in Appendix B.

[535] MCI urges the Commission to retain the tariff review plan as it currently exists, MCI Supplemental Comments at 48-49; but much of this data would be of no value under price caps, and a substantial burden to price cap LECs. For example, the TRP requires LECs to compute a complete and detailed projection of future costs and demand for all rate elements. This information is irrelevant to the price cap plan. *See* Appendix F.

[536] 4 FCC Rcd at 3167 n.1304.

[537] Alltel Comments at 33-35 (asserting that carriers below Tier 1 should be subject to reduced reporting requirements, and suggesting that they file a modified Tier 2-B TRP only. Alltel also argues that Tier 2 carriers should not be required to file quarterly, but only annually).

[538] USTA Comments at 8-9, 36-37; USTA Reply at 34-35; United Comments at 6-7. These commenters urge that we make other monitoring changes too, to decrease the reporting burden for small LECs, so that these small LECs will not be deterred from electing price cap regulation.

[539] *See* Part 32 of the Commission's Rules, 47 C.F.R. Part 32. Tier 1 was defined for purposes of access tariff filings for 1985 as comprising those carriers whose regulated revenues exceed $100 million.

[540] *See, e.g.*, Commission Requirements for Cost Support Material To Be Filed with Access Tariffs on October 3, 1986, Mimeo No. 6356 (released Aug. 15, 1986).

[541] The most recent Form 492 summary shows 77 LECs plus NECA.

[542] Because Form 492 reports are filed to be consistent with the level of aggregation in the tariff, some Form 492 reports are aggregated, while others are not: some of the filings cover one

study area, some cover two or more, and some include the Tier 1 LEC's Tier 2 affiliates (if those affiliates join in the Tier 1 LEC's tariff filing).

[543] *See* Ameritech Supplemental Comments at 9.

[544] Ad Hoc Comments at 46-48; MCI Supplemental Comments at 48.

[545] *See, e.g.*, Ameritech Supplemental Comments at 6-7; SWB Supplemental Reply at 23. *See also* NCTA Comments at 15; NCTA Reply at 9. NCTA argues the Commission must make it clear we will revisit the plan early if access rates become too disparate; NCTA states that the Commission must be prepared to commit to any corrective action necessary to ensure that the access rates of small and rural LECs do not rise unreasonably.

[546] GTOC Supplemental Reply at 12-13; SWB Supplemental Reply at 2; Ameritech Supplemental Comments at 7.

[547] *See, e.g.*, BellSouth Comments at 43; Bell Atlantic Comments at 6-7.

[548] *See* SWB Supplemental Reply at 23-24; Ameritech Supplemental Comments at 7.

[549] SWB Comments at 30-34 (arguing that it will be impossible to determine whether price cap regulation has led to technological progressiveness, due to long lead times, the effects of regional economic conditions, and state regulation); Pactel Comments at 44-45 (urging that the Commission should assess technological progressiveness on the basis of descriptive evidence rather than statistical evidence, by requiring the LECs to describe their efforts to improve and advance their networks and to provide data that supports their descriptions).

[550] *See, e.g.*, NYNEX Comments, Att. B; USTA Comments at 37, 39-40.

[551] *See, e.g.*, BellSouth Comments at 43 (arguing that the comprehensive review should conform to the data this Commission presently collects); Bell Atlantic Comments at 6-7 (stating that the review should focus on: the degree to which LECs have provided real price decreases; efficiency improvements while maintaining quality of service; and new and innovative services); SWB Comments at 30-34 (suggesting such measures as growth in percentage of fiber miles in loop plant, or growth in percentage of access lines with ISDN). Other LECs suggest measurements very similar to those we have included in our infrastructure reporting requirement. *See, e.g.*, NYNEX Comments, Attachment B at 3; USTA Comments at 39-40.

[552] Others suggest that we look at indicators of the penetration level of basic service elements and basic service arrangements available, such as percentages of customers with local access to gateway services, to custom local areas signalling services (CLASS), and to ISDN. NYNEX Comments, Att. B, at 3.

[553] *See* e. g., Iowa Comments at 10; Ohio PUC Reply at 3-4; NARUC Reply at 8- 9; Ad Hoc Comments at 43-44.

[554] *See* Ad Hoc Comments at 43-45 (arguing that the Commission must clarify how and when the productivity offset might be adjusted, and how deficiencies in the caps plan will be uncovered).

[555] For example, some parties argue that price cap regulation of ONA services fundamentally conflicts with the goals of ONA. *See, e.g.*, Ad Hoc Comments at 48-50; ICA Comments at 9-10. Other parties question the basket and band treatment to be used for ONA services. *See, e.g.*, USTA Reply at 33 (include ONA subelements in the service band or category of the service element from which it was unbundled); MCI Comments at 59-60 (establish separate bands for ONA subelements); ADAPSO Supplemental Comments at 6-8 (exclude ONA services from price caps). Other commenters question the tariff treatment these services would receive under price cap regulation. *See, e.g.*, Telenet Comments at 4-5 (net revenue standard for new services is unworkable).

[556] *Accord* NY Clearinghouse Comments at 16-17.

[557] Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture, Notice of Proposed Rule Making, CC Docket No. 89-79, 4 FCC Rcd 3983 (1989).

[558] *Second Further Notice*, 4 FCC Rcd 2873, 3288-3289 (paras. 867-872); *Further Notice*, 3 FCC Rcd 3195, 3379 (para. 328).

[559] *See* BellSouth Comments at 60-61; Ohio PUC Comments at 17; API Comments at 27; USTA Comments at 7; Rochester Reply at 3.

[560] Arkansas PSC Comments at 2.

[561] 47 U.S.C. §208. As discussed in the section detailing our sharing mechanism, *supra*, we have created sharing obligations based on total company earnings that automatically permit ratepayers to share in high earnings. Accordingly, complaints concerning LEC total earnings will lie only if a complainant alleges non-compliance with the rules. Also, complaints relating to excessive earnings on specific rates or rate discrimination will continue to lie.

[562] API Comments at 41-42; Allnet Comments at 4.

[563] *See* Federal Communications Commission Authorization Act of 1987, P.L. 100-594 (signed Nov. 3, 1988). *See also* 47 U.S.C. §204(a)(2)(A) and (B).

[564] *See, e.g.*, IDCMA Comments at 51-52.

[565] Bell Atlantic Comments at 15, n.42 (opposing proposed rule and suggesting issue be deferred to our pending Part 65 proceeding under CC Docket 87-463); US West Comments at 31-32 (suggesting rule be expanded to permit cash refunds as well as prospective PCI adjustments). *See also Second Further Notice*, Appendix D, at 4 FCC Rcd 3353, proposing a new Section 65.703(h).

[566] For a more complete discussion of our sharing mechanisms under price cap regulation, *see* Section II.A.4. *supra*.

[567] *See* US West Comments at 32.

[568] *See, e.g.*, Investigation of Special Access Tariffs of Local Exchange Carriers, CC Docket No. 85-166, Phase II, Part 1, FCC 90-274, Memorandum Opinion and Order, July 25, 1990, *citing* Annual 1988 Access Tariff Filings, CC Docket No. 88-1, Phase II, Memorandum Opinion and Order on Reconsideration, 4 FCC Rcd 3965, 3966 (1989), petition for review pending, *Southern Bell Telephone and Telegraph Company and South Central Bell Telephone Company et al. v. FCC et al.*, D.C. Cir. Nos. 89-1081 et al. *See also Mobil Alaska Pipeline Co. v. U.S.*, 436 US 631, 654-657.

[569] *See New England Telephone and Telegraph Co. v. FCC*, 826 F. 2d 1101 (D.C. Cir. 1987).

[570] *AT&T Price Cap Order*, 4 FCC Rcd at 3295-3307 (paras. 880-895).

[571] *Second Further Notice*, 4 FCC Rcd at 3307 (para. 896).

[572] With regard to existing rates, we note that our concurrent reduction of the unitary rate of return will further assure the reasonableness of the rates price cap carriers use as the basis for their initial price cap tariffs. In addition, we will make further adjustments on a case-by-case basis, if any existing or future rates are found unlawful following complaint or other investigatory proceedings.

[573] *See, e.g.*, Ad Hoc Comments at 53-54, 57.

[574] *See* Section II.A.2., *supra*.

[575] *See* Section II. A. 4., *supra*.

[576] As discussed in the context of AT&T, we believe it is appropriate, and consistent with relevant precedent, to permit greater earnings flexibility as a mechanism for improving efficiency. *See* 4 FCC Rcd at 3299-3300 (para. 886) and nn. 1840, 1841.

[577] *See Nader v. FCC*, 520 F.2d 182 (D.C. Cir. 1975).

[578] *See generally AT & T v. FCC*, 836 F.2d 1386 (D.C. Cir. 1988).

[579] *See, e.g.*, Florida Citizens Comments at 4-5 (expressing concern that, even with the previously proposed automatic stabilizer, rates authorized under price caps would be "largely divested of cost-based principles"); Maryland PC Comments at 2-3 (must measure carrier costs either individually or by peer group average -- no "zone of reasonableness" can be established around a point that is itself not demonstrably reasonable); Maryland PC Reply at 2; Ad Hoc Comments at ii and 4 (asserting that the non-cost based character of the price caps proposal is "inconsistent" with cost based ONA rates and that the Commission employs "very subtle argumentation to camouflage the arbitrariness of this inconsistency"); IIA Comments at 1 (plan fails to address the potential for deviations from just and reasonable, cost based rates for common carrier services); NCTA Reply at 19 (rates must be based on carrier costs).

[580] *See Second Further Notice*, 4 FCC Rcd at 3296-99 (paras. 882-85). *See also* Section I. C. and D., *supra*.

[581] *See id.*, 4 FCC Rcd at 3299-3300 (para. 886) and nn.1840, 1841.

[582] IIA Comments at 3; Maryland PC Comments at 2-3; CFA Reply at 1-2 (contending that Commission's latitude does not extend to elimination of the regulation of service cost and earnings for dominant carriers); Maryland PC Comments at 3-4 (by improperly relying on cases endorsing zones of reasonableness in essentially competitive industries, the Commission seeks to "parlay" emergence of some competition for AT&T into grounds for claiming such cases support price cap regulation for the LECs); *accord* Ohio PUC at 2 (competition is a precondition to the efficacy of price cap regulation); Hawaii Supplemental Reply at 3 (because LECs retain monopoly control over interstate local access market, price caps cannot prevent prices from diverging from costs over time because there is no inherent pressure for this relationship to exist).

[583] It should be noted that while the Commission expressly did not rely on competition as a prerequisite for its legal authority to adopt price caps for AT&T, it did state that the existence of competition would "provide added assurance" that AT&T's rates would remain within the zone of reasonableness. *See* 4 FCC Rcd at 3303 (para. 892) and n. 1857. The sharing mechanism we adopt here directly establishes the "added assurance" that competition more indirectly provides in the context of the interexchange market.

[584] *See* 47 U.S.C. §§ 204, 208.

[585] Specific reference is made to three sections of this Report and Order: service quality reporting, with the addition of post dial delay, installation interval, repair intervals, and network blockage (*see* part III. A. 1. b and c., *infra);* infrastructure development, with the addition of reporting categories established in Common Carrier Docket No. 89-624 (*see* part III. A. 3., *infra);* and reporting of excluded services revenues (*see* part II.B.1., *infra).*

[586] *See also* NYNEX Reply, App. E, for a discussion of savings related to price cap tariff filing procedures.

[587] Because of the nature of local exchange and access service, this Commission has concluded that small telephone companies are dominant in their fields of operation and therefore are not small entities as defined by the Regulatory Flexibility Act. *See* MTS and WATS Market Structure, 93 FCC 2d 241, 338-39 (1983). Thus, this Commission is not required by the terms of that Act to apply the formal procedures set forth therein. Accordingly, we continue to reject the assertions of SBA to the contrary. *See* SBA Comments at 4 n.2. We are nevertheless committed to reducing the regulatory burdens on small telephone companies whenever possible consistent with our other public interest responsibilities. Accordingly, we have chosen to utilize, on an informal basis, appropriate Regulatory Flexibility Act procedures to analyze the effect of proposed regulations on small telephone companies.

[588] We thus reject the claims of SBA that this Commission has not adequately analyzed the effects of these rules on small businesses. Similarly, in light of the optional application of price cap regulation to smaller LECs, we reject SBA's assertion that we have not adequately examined regulatory alternatives for smaller LECs. *See* SBA Comments at 3.

[589] Ronan Supplemental Reply at 14-15.

[590] Access Tariff Filing Schedules, Report and Order, CC Docket No. 88-326, 3 FCC Rcd 5495 (1988).

[591] *See* Ameritech Comments at 5 n.5; Bell Atlantic Comments at 3 n.6; NYNEX Comments at 6-7; Pactel Comments at i, 3-6; SWB Comments at 5; USTA Comments at 4, 16-19; US West Supplemental Comments at 67; SWB Supplemental Comments at 21; NECA Supplemental Comments at 1-2; Pactel Supplemental Comments at 73; NYNEX Supplemental Reply at 26; Pactel Supplemental Reply at 7; US West Supplemental Reply at 26-29.

[592] We note that we have set a 90-day review period for full, annual price cap tariff filings; the fact that this first filing will establish tariffs to be effective for six months, and that it will not include application of the adjustment formulas, allows us to establish a shorter, 60-day review period.

[593] These parties request that we release a tentative decision, rather than a final decision, in order to allow for further comment. We believe that the three-year course of this proceeding, and in particular this Commission's issuance of a *Supplemental Notice* following the *Second Further Notice* (resulting in a record of more than 11,000 pages) constitutes a full and fair opportunity for notice and comment, and that a final order is fully justified and appropriate at this time.

Statement of Commissioner Ervin S. Duggan

Concurring in Part, Dissenting in Part

In Re: Policy and Rules Concerning Rates for Dominant Carriers (CC Docket No. 87-313), ***Report and Order***

Price cap regulation promises to produce lower rates for consumers and, simultaneously, to spur efficiency, innovation and new investments by industry. Because I support these goals, I am eager to see a plan establishing price caps for local exchange telephone companies succeed.

While I support the result that the Commission votes for today, however, I must dissent in part--- albeit quietly and respectfully--- on one key element of the plan: the Commission's choice of a common line formula.

My chief concern in this proceeding is the Commission's explicit promise that under a price cap system of regulation, rates will be lower than under the traditional rate-of-return system. The Commission put that promise this way in 1988:

> [W]e propose to [e]nsure that consumers benefit from price cap regulation by extracting from carriers real rate decreases that reasonably can be expected to exceed those which would have resulted if rate-of-return regulation were applied . . . [T]he half a percentage point premium [the consumer productivity dividend] that we are placing on the productivity factor ensures, on an ongoing basis, that ratepayers will be better off under price caps than they would have been under rate-of-return regulation. *Further Notice* in CC Docket No. 87-313, 3 FCC Rcd 3195, 3263, 3408, (1988) [Emphasis added.]

Later, in its *Report and Order* adopting price caps for AT&T the following year, the Commission repeated its determination to ensure that "ratepayers are better off under price cap regulation"— and spoke of a " *guarantee* that under a price cap system, inflation-adjusted rate reductions will exceed the historical average under rate of return." 4 FCC Rcd 2873, 3001 (1989) [Emphasis added.]

The Common Line Formula

I am not confident that the common line formula chosen by the majority today does enough to further the goal of lower rates for consumers. Indeed, I fear that it will have the opposite effect.

Because of unique characteristics associated with common lines (or "subscriber lines"), a price cap formula that is rational for other service baskets may not make sense for the common line basket. Common line costs are "non-traffic-sensitive": no matter how much or how little a subscriber uses such a line, that is, the telephone company's cost for the line remains the same.

Under rate-of-return regulation, when usage per line increases, the telephone company's effective cost-per-minute falls and the savings are passed through to ratepayers. And historically, demand — expressed in terms of minutes of use per line — has grown each year. And so, as telephone ratepayers have made increasingly heavy use of these lines, the cost-per-minute to the local telephone company has fallen, and the decline in cost has resulted in declining rates paid by long-distance companies for access to the local exchange— the carrier common line charge. The recent marked decline in access charges also has been fueled by the FCC's requirement that much of the cost of subscriber lines be recovered through flat subscriber line charges. This decline in access charges has made it possible for long-distance companies to offer their services, in recent years, at ever-lower prices. Lower prices, in turn, have stimulated increased calling--a highly satisfactory self-reinforcing effect.

Because common line costs do not vary with usage, the most rational approach to capping the common line "basket," in my view, is to impose a cap on the price of each subscriber line—the so-called "per line" approach. Because common line revenues are collected both through flat charges (the so-called subscriber line charges) and through usage-based charges (the carrier common line charge), the effect of a per-line price cap approach would be to drive the per-minute charge *down* as usage increases: the same rate effect that one would see under rate-of-return regulation. As costs per minute fall, rates per minute would fall proportionally—an approach which, in my judgment, would more strongly support the Commission's expressed promise to ensure that ratepayers will be better off under price cap regulation. A per line approach, moreover, would give the local telephone company the incentive to pare down its costs for providing subscriber lines, while giving the customers—both long-distance carriers and telephone subscribers—a price incentive to increase usage.

A Misplaced Benefit?

Under the "balanced 50-50" formula chosen by the majority, however, ratepayers will likely pay higher carrier common line rates than under rate-of-return regulation. The "balanced 50-50" formula takes half the benefit of increased network usage from the consumer (either the long-distance carrier or the caller, to whom it would go under rate-of-return regulation) and gives it instead to the local exchange carrier. The greater the increase in demand growth under this "balanced 50-50" formula, the greater the benefit to the local exchange company—and the worse the potential disadvantage to ratepayers.

In the course of an intense debate over this question within the Commission, the Chairman and the staff have done much to mitigate the potential disadvantage to ratepayers that their chosen formula has presented for me; today's plan is, to my mind, a great improvement over what was earlier proposed. But the revised formula still is impossible for me to rationalize; it still awards half the benefit of demand growth over subscriber lines to the local telephone companies, even though there is relatively little they can do, as local companies, to stimulate interstate usage. Generous efforts have been made to make it possible for me to travel the distance between the per-line approach and the "50-50" option; I continue, however, to find even the balanced "50-50" approach impossible to justify.

Who Stimulates Demand?

Some will see, in the Commission's selected common line formula, a noble effort to make a Solomonic compromise between two demanding industries. For me, however, to make a half-way split between what seems rational and what appears irrational is to arrive at only a semi-rational result. Others will justify the "50-50" formula's assignment of certain demand-growth benefits to the local exchange companies as an "incentive" to them to make future investments that will stimulate increased interstate long-distance calling. But I am not convinced that the local exchange companies have any great ability to stimulate such demand. And to the extent that they do, they already enjoy ample incentives to boost usage—because "traffic-sensitive" rates, designed to cover traffic-sensitive costs, are capped on a per-minute basis.

Let us assume for the nonce that some of the benefit of this demand growth should go to local exchange companies as an incentive to stimulate further usage. A question then arises: How much? I can simply find no

rational basis---other than a somewhat arbitrary generosity---for giving fully half of that benefit to the LECs. To my mind most, if not all, of the incentive should go to the interexchange carriers and to interstate long-distance callers---the parties most responsible for increasing usage.

The amounts in question are not trivial. Depending upon actual growth in interstate demand over the next several years, the LECs could reap hundreds of millions of extra dollars through the formula adopted by the Commission today. We all hope, of course, that these millions will be wisely invested in the telephone network. But our hope remains just that, a hope; we have no guarantee that this generous "incentive" will call forth the response we desire.

The Threat to Ratepayers

The majority's chosen formula, moreover, threatens to reduce the stimulus to demand that results from ever-decreasing carrier common line charges. Keeping carrier common line charges artificially high under price caps will, I fear, dampen demand for interexchange services. At a time when the nation faces a possible recession, we should be wary of any risk of increasing costs for businesses and consumers.

Another promised benefit of price caps is that telephone companies, under price caps, will find it much more difficult to engage in cross-subsidies because of the downward pressure exerted by the price caps for each service basket. If telephone companies find themselves presented with a generous revenue "cushion" in one service basket, however---for example, from too liberal a formula in the common line basket---they will be better able to underprice those services in other baskets for which they face competition.

The public will measure the success of our price cap program against three yardsticks: rates, service quality and infrastructure investment. If price caps fail to measure up against any one of these yardsticks, we will be faced with intense (and justified) criticism---and with the necessity for an agonizing reappraisal. Along with my fellow Commissioners, I will carefully monitor the industry's progress under this new regulatory regime. I will be watching to see whether rates have been at least as favorable to consumers as they would have been under rate-of-return regulation, whether service quality has been maintained, and whether the local exchange companies have invested sufficiently in the network.

Despite my reservations, I am cautiously optimistic that price caps can bring positive change to this industry and to ratepayers. Months of cordial and informative meetings with officials of the local exchange companies have convinced me that they are determined and eager to improve service to their consumers under the incentives provided by price cap regulation. Nothing could give me more pleasure than to find, in our formal review three years hence, that my reservations have been overcome by experience, and that price caps are a resounding success, both for the telecommunications industry and for the nation's consumers.

APPENDIX A

PRICE CAP PROCEEDING
LIST OF COMMENTERS

Second Further Notice

The following parties filed comments:

Ad Hoc Telecommunications Users Committee (Ad Hoc)
Alabama Public Service Commission (Alabama PSC)
Alltel Corporation (Alltel)
Allnet (Allnet)
Association for Local Telecommunications Services (Local Telecom)
Ameritech Operating Companies (Ameritech)
American Petroleum Institute (API)
American Telephone and Telegraph Company (AT&T)
Bell Atlantic Telephone Companies (Bell Atlantic)
BellSouth Corporation (BellSouth)
California Public Utilities Commission (California PUC)
Cincinnati Bell Telephone Company (CBT)
Central Telephone Company (Centel)
Contel Corporation (Contel)
Citizens for a Sound Economy (CSE)
David Systems, Inc. (David)
D.C. Public Service Commission (DC PSC)
Federal Executive Agencies (Executive Agencies)
Citizens of Florida (Florida Citizens)
GTE Telephone Operating Companies (GTOC)
State of Hawaii (Hawaii)
International Communications Association (ICA)
Independent Data Communications Manufacturers Association (IDCMA)
Information Industry Association (IIA)
Illinois Commerce Commission (Illinois)
Indiana Office of Utility Consumer Counselor (jointly with NASUCA)
(Indiana UCC)
Integrated Network Corporation (Integrated Network)
Iowa State Utilities Board (Iowa)
Lincoln Telephone Company (Lincoln)
Local Area Telecommunications (LOCATE)
MCI Telecommunications Corporation (MCI)
Maryland People's Counsel (Maryland PC)
Metropolitan Fiber Systems (Metropolitan)
Michigan Public Service Commission Staff (Michigan PSC)
Missouri Public Service Commission (Missouri PSC)
National Exchange Carrier Association (NECA)
Captital Cities/ABC, CBS, and NBC (Networks)

New York Clearinghouse Association, et al. (NY Clearinghouse)
National Telephone Cooperative Association (NTCA)
New York State Department of Public Service (New York DPS)
New York Telephone Company and New England Telephone and Telegraph Company (NYNEX)
Ohio Public Utilities Commission (Ohio PUC)
Organization for the Protection and Advancement of Small Telephone Companies (OPASTCO)
Pacific Bell and Nevada Bell (Pactel)
Puerto Rico Telephone Company (PRTC)
Rochester Telephone Corporation (Rochester)
Ronan Telephone Company (Ronan)
United States Small Business Administration (SBA)
Southern New England Telephone Company (SNET)
Southwestern Bell Telephone Company (SWB)
Telephone and Data Systems (TDS)
Tele-Communications Association (TCA)
Telephone Utilities Exchange Carrier Association (TUECA)
Telenet (Telenet)
United Telecommunications, Inc. (United)
University Group Project (University)
United States Telephone Association (USTA)
Mountain States Telephone and Telegraph Company, Northwestern Bell Telephone Company and Pacific Northwest Bell Telephone Company (US West)
Verilink Corporation (Verilink)
West Virginia Public Service Commission (W. Virginia PSC)

The following parties filed reply comments:

Ad Hoc
Alltel
Ameritech
API
AT&T
Bell Atlantic
BellSouth
CBT
Centel
Consumer Federation of America (CFA)
Colorado Office of Consumer Counsel (Colorado OCC)
DC PSC
Department of Justice (Justice)
Executive Agencies
GTOC
Hawaii
ICA
IDCMA
Illinois
Illinois Consolidated Telephone Company (Illinois Telco)

Indiana UCC
Long Distance/USA (LD/USA)
Local Telecom
LOCATE
MCI
Maryland PC
Metropolitan
National Association of Broadcasters (NAB)
National Association of Regulatory Utility Commissioners (NARUC)
National Cable Television Association (NCTA)
Networks
NY Clearinghouse
NTCA
NYNEX
Office of Ohio Consumer Counsel (Ohio Counsel)
Ohio PUC
OPASTCO
Pactel
PRTC
Rochester
SNET
SWB
TDS
TCA
TUECA
United
USTA
US West

Supplemental Notice

The following parties filed supplemental comments:

Computer Software and Services Industry Association (ADAPSO)
Ad Hoc
Alltel
Allnet
Ameritech
API
Aeronautical Radio Inc. (Aeronautical Radio)
AT&T
Bell Atlantic
BellSouth
Boeing Computer Services (Boeing Computer)
California PUC
CBT
Committee of Corporate Telecommunications Users (Corporate Committee)
Centel

Competitive Telecommunications Association (Comptel)
Contel
CSE
DC PSC
Executive Agencies
GTOC
Hawaii
ICA
IIA
Integrated Network
ADAPSO, Ad Hoc Telecommunications Users Committee, Aeronautical Radio, Aetna Life & Casualty, Allnet, American Airlines, American Express, AT&T, America's Carriers Telecommunications Association, Automatic Data Processing, Inc., Boeing Computer, and 25 others. (Joint Parties)
Lincoln Telephone Company (Lincoln)
Local Telecom
MCI
Metropolitan
National Association of State Utility Consumer Advocates (NASUCA)
NECA
NTCA
National Telecommunications and Information Administration (NTIA)
New York DPS
NYNEX
OPASTCO
Pactel
PRTC
Rochester
SBA
SNET
TCA
Teleport Communications Group (Teleport)
United
USTA
US West

The following parties filed supplemental reply comments:

Ad Hoc
Alaska
Alltel
Local Telecom
Ameritech
AT&T
Bell Atlantic
BellSouth
Boeing Computer
CBT
Centel
Contel
CSE
Office of People's Counsel, District of Columbia (DC People's Counsel)
DC PSC
Executive Agencies
GTOC
Hawaii
ICA
IDCMA
MCI
Metropolitan
NASUCA
NTCA
NYNEX
Pactel
PRTC
Rochester
Ronan Telephone Company (Ronan)
SNET
SWB
TDS
TCA
United
USTA
US West

APPENDIX B

AMENDMENTS TO THE CODE OF FEDERAL REGULATIONS

Title 47 of the CFR, Parts 61, 65, and 69 are amended as follows:

PART 61 -- TARIFFS

1. The authority citation for Part 61 continues to read as follows:

Authority: Sec. 4, 48 Stat. 1066, as amended; 47 U.S.C. 154. Interpret or apply sec. 203, 48 Stat. 1070; 47 U.S.C. 203.

2. Section 61.3 is amended by revising paragraphs (u), (w), and (x) to read as follows:

§ 61.3 Definitions.

* * * * *

(u) Price Cap Index (PCI). An index of costs applying to carriers subject to price cap regulation, which index is calculated for each basket pursuant to §§ 61.44 or 61.45. * * * * *

(w) Price cap tariff. Any tariff filing involving a service that is within a price cap basket, or that requires calculations pursuant to §§ 61.44, 61.45, 61.46, or 61.47.

(x) Productivity factor. An adjustment factor used to make annual adjustments to the Price Cap Index to reflect the margin by which a carrier subject to price cap regulation is expected to improve its productivity relative to the economy as a whole.

* * * * *

3. Section 61.38 is amended by revising the last sentence of paragraph (a) to read as follows:

§ 61.38 Supporting information to be submitted with letters of transmittal.

(a) * * * This section (other than the preceding sentence of this paragraph) shall not apply to tariff filings proposing rates for services identified in §§ 61.42(a), (b), (d), (e), and (g), which filings are submitted by carriers subject to price cap regulation.

* * * * *

4. Section 61.39 is amended by adding the following new sentence at the end of paragraph (a) to read as follows:

§ 61.39 Optional supporting information to be submitted with letters of transmittal for Access Tariff filings effective on or after January 1, 1989, by local exchange carriers serving 50,000 or fewer access lines that are described as subset 3 carrier in § 69.602.

(a) * * * This section (other than the preceding sentence of this paragraph) shall not apply to tariff filings proposing rates for services identified in §§ 61.42(d), (e), and (g), which filings are submitted by carriers subject to price cap regulation.

* * * * *

5. Section 61.41 is revised to read as follows:

§ 61.41 Price cap requirements generally.

(a) Sections 61.42 through 61.49 shall apply as follows:

(1) To dominant interexchange carriers, as specified by Commission order;

(2) To such local exchange carriers as specified by Commission order, and to all local exchange carriers, other than average schedule companies, that are affiliated with such carriers; and

(3) On an elective basis, to local exchange carriers, other than those specified in paragraph (2), that are neither participants in any Association tariff, nor affiliated with any such participants, except that affiliation with average schedule companies shall not bar a carrier from electing price cap regulation provided the carrier is otherwise eligible.

(b) If a telephone company, or any one of a group of affiliated telephone companies, files a price cap tariff in one study area, that telephone company and its affiliates, except its average schedule affiliates, must file price cap tariffs in all their study areas.

(c) The following rules apply to telephone companies subject to price cap regulation, as that term is defined in § 61.3(v), which are involved in mergers, acquisitions, or similar transactions.

(1) Any telephone company subject to price cap regulation that is a party to a merger, acquisition, or similar transaction shall continue to be subject to price cap regulation notwithstanding such transaction.

(2) Where a telephone company subject to price cap regulation acquires, is acquired by, merges with, or otherwise becomes affiliated with a telephone company that is not subject to price cap regulation, the latter telephone company shall become subject to price cap regulation no later than one year

following the effective date of such merger, acquisition, or similar transaction and shall accordingly file price cap tariffs to be effective no later than that date in accordance with the applicable provisions of this Part 61.

(3) Nothwithstanding the provisions of § 61.41(c)(2) above, where a telephone company subject to price cap regulation acquires, is acquired by, merges with, or otherwise becomes affiliated with a telephone company that qualifies as an "average schedule" company under §§ 69.605 and 69.606, the latter company may, but shall not be obligated to, become subject to price cap regulation.

(d) Local exchange carriers that become subject to price cap regulation as that term is defined in § 61.3(v) of this chapter shall not be eligible to withdraw from such regulation.

6. Section 61.42 is amended by redesignating paragraph (d) as paragraph (g), by revising the first sentence thereof, and by adding new paragraphs (d), (e), and (f) to read as follows:

§ 61.42 Price cap baskets and service categories.

* * * * *

(d) Each local exchange carrier subject to price cap regulation shall establish baskets of services as follows:

(1) A basket for the common line interstate access elements as described in § 69.103, 69.104, 69.105, and 69.115 of this chapter;

(2) A basket for traffic sensitive switched interstate access elements;

(3) A basket for special access services as described in § 69.114 of this chapter; and

(4) to the extent that a local exchange carrier specified in § 61.41(a)(2) or (3) above offers interexchange services that are not classified as access services for the purposes of Part 69 of this Commission's Rules, such exchange carrier shall establish a fourth basket for such services.

(e)(1) The traffic sensitive switched interstate access basket shall contain such services as the Commission shall permit or require, including the following service categories: (i) local switching as described in § 69.106; (ii) equal access as described in §69.107; (iii) information, as described in § 69.109; and (iv) transport, as described in §§ 69.111 and 69.112 of this chapter.

(2) The basket for special access services shall contain such services as the Commission shall permit or require, including the following service categories: (i) voice grade, WATS, metallic, and telegraph services; (ii) audio and video services; (iii) high capacity and DDS services; and (iv) wideband data and wideband analog services.

(f) Each local exchange carrier subject to price cap regulation shall exclude from its price cap baskets such services or portions of such services as the Commission has designated or may hereafter designate by order.

(g) New services, other than those within the scope of paragraphs (c) and (f) of this section, * * *

7. Section 61.43 is amended by revising the first sentence to read as follows:

§ 61.43 Annual price cap filings required.

Carriers subject to price cap regulation shall submit annual price cap tariff filings that propose rates for the upcoming year, that make appropriate adjustments to their PCI, API, and SBI values pursuant to §§ 61.44 through 61.47, and that incorporate the costs and rates of new services into the PCI, API, or SBI calculations pursuant to §§ 61.44(g), 61.45(g), 61.46(b), and 61.47(b) and (c). * * *

8. Section 61.44 is amended by revising the heading and first sentences of paragraphs (a) and (b) to read as follows:

§ 61.44 Adjustments to the PCI for Dominant Interexchange Carriers.

(a) Dominant interexchange carriers subject to price cap regulation shall file adjustments to the PCI for each basket as part of the annual price cap tariff filing, and shall maintain updated PCIs to reflect the effect of mid-year access and exogenous cost changes. * * *

(b) Subject to paragraph (d) of this section, adjustments to each PCI of dominant interexchange carriers subject to price cap regulation shall be made pursuant to the following formula: * * *

* * * * *

9. New section 61.45 is added to read as follows:

§ 61.45 Adjustments to the PCI for Local Exchange Carriers.

(a) Local exchange carriers subject to price cap regulation shall file adjustments to the PCI for each basket as part of the annual price cap tariff filing, and shall maintain updated PCIs to reflect the effect of mid-year exogenous cost changes.

(b) Adjustments to local exchange carrier PCIs for the baskets designated in §§ 61.42(d)(2), (3), and (4) shall be made pursuant to the formula set forth in § 61.44(b), and as further explained in §§ 61.44(e), (f), (g), and (h).

(1) Notwithstanding the value of X defined in § 61.44(b), the X value applicable to the baskets specified in § 61.42(d)(2) and (3) shall be 3.3%, or 4.3% if the carrier so elects.

(2) For the basket specified in § 61.42(d)(4), the value of X shall be 3%, or 4% if the carrier so elects.

(c) Subject to paragraph (e) of this section, adjustments to local exchange carrier PCIs for the basket designated in § 61.42(d)(1) shall be made pursuant to the following formula:

$$PCI_t = PCI_{t-1}[1 + w[(GNP\text{-}PI - X - (g/2))/(1 + (g/2))] + \Delta Z/R]$$

where

GNP-PI = the percentage change in the GNP-PI between the quarter ending six months prior to the effective date of the new annual tariff and the corresponding quarter of the previous year,

X = productivity factor of 3.3%, or 4.3% if the carrier so elects,

g = the ratio of minutes of use per access line during the base period, to minutes of use per access line during the previous base period, minus 1,

ΔZ = the dollar effect of current regulatory changes when compared to the regulations in effect at the time the PCI was updated to PCI_{t-1}, measured at base period level of operations,

R = base period quantities for each rate element "i", multiplied by the price for each rate element "i" at the time the PCI was updated to PCI_{t-1},

w = $R + \Delta Z$, all divided by R,

PCI_t = the new PCI value, and

PCI_{t-1} = the immediately preceeding PCI value.

(d) The exogenous cost changes represented by the term "ΔZ" in the formulas detailed in paragraphs (b) and (c), shall be limited to those cost changes that the Commission shall permit or require.

(1) Subject to further order of the Commission, those exogenous cost changes shall include cost changes caused by (i) the completion of the amortization of depreciation reserve deficiencies; (ii) changes in the Uniform System of Accounts; (iii) changes in the Separations Mannual; (iv) changes to the level of obligation associated with the Long Term Support Fund and the Transitional Support Fund described in § 69.612; (v) the reallocation of investment from regulated to nonregulated activities pursuant to § 64.901; (vi) such tax law changes and other extraordinary exogenous cost changes as the Commission shall permit or require, and (vii) retargeting the PCI to the level specified by the Commission for carriers whose base year earnings are below the level of the lower adjustment mark.

(2) Local exchange carriers specified in § 61.41(a)(2) or (a)(3) shall also make such temporary exogenous cost changes as may be necessary to reduce PCIs to give full effect to any sharing of base period earnings required by the sharing mechanism set forth in the Commission's Second Report and Order in Common Carrier Docket No. 87-313, FCC 90-314, adopted September 19, 1990.

(3) Local exchange carriers specified in § 61.41(a)(2) or (a)(3) shall, in their annual access tariff filing, recognize all exogenous cost changes attributable to modifications during the coming tariff year in the obligations specified in § 61.45(d)(1)(iv) as well as those changes attributable to alterations in their Subscriber Plant Factor and the Dial Equipment Minutes factor.

(4) Exogenous cost changes shall be apportioned on a cost-causative basis between price cap services as a group, and excluded services as a group. Exogenous cost changes thus attributed to price cap services shall be further apportioned on a cost-causative basis among the price cap baskets.

(e) The "$w[(GNP\text{-}PI - X - (g/2))/(1 + (g/2))]$" component of the PCI formula contained in paragraph (c) shall be employed only in the adjustment made in connection with the annual price cap filing.

(f) The exogenous costs caused by new services subject to price cap regulation must be included in the appropriate PCI calculations under paragraph (c) of this section beginning at the first annual price cap tariff filing following completion of the base period in which such services are introduced.

(g) In the event that a price cap tariff becomes effective, which tariff results in an API value (calculated pursuant to § 61.46) that exceeds the currently applicable PCI value, the PCI value shall be adjusted upward to equal the API value.

(h) To the extent a local exchange carrier elects the higher productivity factor, the election must be made in all baskets.

10. Section 61.46 is amended by revising the first part of paragraph (a) and by adding new paragraph (d) to read as follows:

§ 61.46 Adjustments to the API

(a) Except as provided in paragraphs (d) and (e) of this section, in connection with any price cap tariff filing proposing rate changes, the carrier must calculate an API for each affected basket pursuant to the following methodology:

* * * * *

(d) In connection with any price cap tariff proposing changes to rates for services in the basket designated in § 61.42(d)(1), the carrier common line (CCL) charges shall be computed pursuant to the following methodology:

$$CCL_{MOU} = CL_{MOU} * (1 + \% \text{ change in CL PCI}) - EUCL_{MOU} * 1 / (1 + (g/2))$$

where

CCL_{MOU} = the sum of each of the proposed Carrier Common Line rates multiplied by its corresponding base period Carrier Common Line minutes of use, divided by the sum of all types of base period Carrier Common Line minutes of use,

CL_{MOU} = the sum of each of the existing Carrier Common Line rates multiplied by its corresponding base period Carrier Common Line minutes of use plus each existing End User Common Line (EUCL) rate multiplied by its corresponding base period lines, divided by the sum of all types of base period Carrier Carrier Common Line minutes of use,

$EUCL_{MOU}$ = proposed End User Common Line rates multiplied by base period lines, and

g = the ratio of minutes of use per access line during the base period to minutes of use per access line during the previous base period, minus 1.

(e) In addition, for the purposes of § 61.46(d), "Existing Carrier Common Line Rates" shall include existing originating premium, originating non-premium, terminating premium, and terminating non-premium rates; and "End User Common Line Rates" used to calculate the CL_{MOU} and the $EUCL_{MOU}$ factors shall include, but not be limited to, Residential and Single Line Business rates, Multi-Line Business rates, Centrex rates, Limited Pay Telephone Rates, and the Special Access surcharge.

11. Section 61.47 is amended by adding paragraph (h) to read as follows:

§ 61.47 Adjustments to the SBI; pricing bands.

* * * * *

(h) Local exchange carriers subject to price cap regulation as that term is defined in § 61.3(v) of this chapter shall use the methodology set forth in paragraphs (a) through (d) of this section to calculate two separate subindexes: one for the DS1 services offered by such carriers and the other for the DS3 services offered by such carriers. Notwithstanding paragraph (e) of this section, the annual pricing flexibility for each of these two subindexes shall be limited to an annual increase or decrease of five percent, relative to the percentage change in the PCI for the special access services basket, measured from the last day of the preceding tariff year.

12. Section 61.48 is amended by adding paragraphs (c), (d), (e), and (f) to read as follows:

§ 61.48 Transition rules for price cap formula calculations.

* * * * *

(c) Local exchange carriers subject to price cap regulation shall file initial price cap tariffs not later than November 1, 1990, to be effective January 1, 1991.

(d) In connection with the initial price cap filing described in paragraph (c) of this section, each PCI, API, and SBI shall be assigned an initial value prior to adjustment of 100, corresponding to the costs and rates in effect as of July 1, 1990.

(e) In connection with the initial price cap filing described in paragraph (c) of this section, initial PCI calculations shall be made without adjustment for any changes in inflation or productivity. Annual price cap filings incorporating the full values of the GNP-PI and productivity offsets will commence April 2, 1991, with a scheduled effective date of July 1, 1991.

(f) Local exchange carriers specified in §61.41(a)(2) or (3) shall, in their initial price cap filings described in paragraph (c) of this section, adjust their PCIs through use of an exogenous cost factor to account for the represcription of the rate of return, effective January 1, 1991.

13. Section 61.49 is amended by revising paragraph (a) and the last sentence of paragraph (g) to read as follows:

§ 61.49 Supporting information to be submitted with letters of transmittal for tariffs of carriers subject to price cap regulation

(a) Each price cap tariff filing must be accompanied by supporting materials sufficient to calculate required adjustments to each PCI, API, and SBI pursuant to the methodologies provided in §§ 61.44, 61.45, 61.46, and 61.47, as applicable.

* * * * *

(g) * * * Each such tariff filing must also be accompanied by data sufficient to make the API and PCI calculations required by §§ 61.46(b), 61.44(g), and 61.45(f), § 61.46(d), and, as necessary, to make the SBI calculations provided in §§ 61.47(b) and (c).

14. Section 61.58(c) is amended by revising paragraphs (c)(1), (c)(5), and (c)(6) to read as follows:

§ 61.58 Notice Requirements.

* * * * *

(c) * * *

(1) For annual adjustments to the PCI, API, and SBI values under §§ 61.44, 61.46, and 61.47, respectively, dominant interexchange carrier filings must be made on at least 45 days' notice. For annual adjustments to the PCI, API, and SBI values under §§ 61.45, 61.46, and 61.47, respectively, local exchange carrier tariff filings must be made on not less than 90 days' notice.

* * * * *

(5) Tariff filings involving a change in rate structure of a service included in a basket listed in § 61.42(a) or § 61.42(d), or the introduction of a new service within the scope of § 61.42(g), must be made on at least 45 days' notice.

(6) The required notice for tariff filings involving services included in § 61.42(c) or § 61.42(f), or involving changes to tariff regulations, shall

be that required in connection with such filings by dominant carriers that are not subject to price cap regulation.

PART 65 -- INTERSTATE RATE OF RETURN PRESCRIPTION PROCEDURES AND METHODOLOGIES

1. The authority citation for Part 65 continues to read as follows:

Authority: Secs. 4, 201, 202, 203, 205, 218, 403, 48 Stat. 1066, 1072, 1077, 1094, as amended, 47 U.S.C. 154, 201, 202, 203, 205, 218, 403.

2. Section 65.1 is revised to read as follows:

§ 65.1 Application of Part 65.

This part establishes procedures and methodologies for Commission prescription of interstate rates of return. This part shall apply to those interstate services and carriers as the Commission shall designate by order. This part shall not apply to dominant interexchange carriers subject to §§ 61.41 through 61.49, except as set forth in §§ 65.600(c), 65.701(c) and 65.703(g) of this chapter. Local exchange carriers subject to §§ 61.41 through 61.49 are exempt from the requirements of this part with the following exceptions: (1) carriers that meet the requirements of § 65.200(b) shall be subject to the filing requirements of Subpart C of this part; (2) carriers subject to §§ 61.41 through 61.49 shall employ the rate of return value calculated for interstate access services in complying with any applicable rules under Parts 36 and 69 that require a return component; (3) carriers subject to §§ 61.41 through 61.49 shall be subject to §§ 65.600(d), 65.701(d), and 65.703(h); and (4) carriers subject to §§ 61.41 through 61.49 shall continue to comply with the prescribed rate of return when offering any services specified in § 61.42(f) unless the Commission otherwise directs.

3. Section 65.600 is amended by revising paragraph (b) and adding new paragraph (d), to read as follows:

(a) * * * * *

(b) Each local exchange carrier or group of affiliated carriers which is not subject to §§ 61.41 through 61.49 of this chapter and which has filed individual access tariffs during the preceding enforcement period shall file with the Commission within three (3) months after the end of each calendar quarter, a quarterly rate of return monitoring report. Each report shall contain two parts. The first part shall contain rate of return information on a cumulative basis from the start of the enforcement period through the end of the quarter being reported. The second part shall contain similar information for the most recent quarter. The final quarterly monitoring report for the entire enforcement period shall be considered the enforcement period report. Reports shall be filed on the appropriate report form prescribed by the Commission (see § 1.795 of this chapter) and shall provide full and specific answers to all questions propounded and information requested in the currently effective report form. The number of copies to be filed shall be specified in the applicable report form. At least one copy of

the report shall be signed on the signature page by the responsible officer. A copy of each report shall be retained in the principal office of the respondent and shall be filed in such manner as to be readily available for reference and inspection. Final adjustments to the enforcement period report shall be made by September 30 of the year following the enforcement period to ensure that any refunds can be properly reflected in an annual access filing. For local exchange carriers subject to §§ 61.41 through 61.49 of this chapter, final adjustments to the final enforcement period report covering the period ending December 31, 1990, shall be made no later than September 30, 1991.

* * * * *

(d) Each local exchange carrier or group of affiliated carriers subject to §§ 61.41 through 61.49 of this chapter shall file with the Commission within three (3) months after the end of each calendar year a report of its total interstate access rate of return for that year. Such filings shall include a report of the total revenues, total expenses and taxes, operating income, and the rate base. Reports shall be filed on the appropriate report form prescribed by the Commission (see § 1.795 of this chapter) and shall provide full and specific answers to all questions propounded and information requested in the currently effective report form. The number of copies to be filed shall be specified in the applicable report form. At least one copy of the report shall be signed on the signature page by the responsible officer. A copy of each report shall be retained in the principal office of the respondent and shall be filed in such manner as to be readily available for reference and inspection.

4. Section 65.701 is amended by adding paragraph (d) to read as follows:

§ 65.701 Period of Review.

* * * * *

(d) Notwithstanding other provisions in this subpart, the final period of review for any local exchange carrier subject to §§ 61.41 through 61.49 of this chapter shall end on December 31, 1990.

5. Section 65.703 is amended by revising the first sentence of paragraph (g) and by adding new paragraph (h) to read as follows:

§ 65.703 Refunds.

* * * * *

(g) For interexchange carriers subject to §§ 61.41 through 61.49 of this chapter, refund obligations incurred prior to the date their tariffs filed pursuant to §§ 61.41 through 61.49 of this chapter take effect for the

first time shall be effectuated by an adjustment to the applicable Actual Price Index, Service Band Index, and Price Cap Index (as defined in § 61.3 of this chapter). * * *

(h) For each local exchange carrier subject to §§ 61.41 through 61.49 of this chapter, refund obligations incurred prior to the end of its final period of review shall be effectuated by an adjustment to the applicable Actual Price Index, Service Band Index, and Price Cap Index (as defined in § 61.3 of this chapter). Carriers making an adjustment to effectuate any outstanding refund requirements from their final enforcement period shall make such adjustments no later than the next scheduled annual price cap adjustment tariff filing following the submission of the final enforcement report. The adjustment shall be designed to complete the required refund within 12 months of the close of such period. Upon completion of the required refund, the Actual Price Index, the Service Band Index, or the Price Cap Index shall be adjusted to remove the effect of the adjustment.

PART 69 -- ACCESS CHARGES

1. The authority citation for Part 69 continues to read as follows:

Authority: Secs. 4, 201, 202, 203, 205, 218, 403, 48 Stat. 1066, 1070, 1072, 1077, 1094, as amended, 47 U.S.C. §§ 154, 201, 202, 203, 205, 218, 403, unless otherwise noted.

2. Section 69.1 is amended by revising paragraph (b) and adding paragraph (c) to read as follows:

§ 69.1 Application of access charges.

* * * * *

(b) Except as provided in § 69.1(c), charges for such access service shall be computed, assessed, and collected and revenues from such charges shall be distributed as provided in this part. * * *

(c) The following provisions of this part shall apply to telephone companies subject to price cap regulation only to the extent that application of such provisions is necessary to develop the nationwide average carrier common line charge and for purposes of reporting pursuant to § 43.21 and § 43.22: §§ 69.3(f), 69.105(b)(4), 69.105(b)(5), 69.106(b), 69.107(b), 69.107(c), 69.109(b), 69.111(c), 69.112(a), 69.112(b)(2), 69.112(b)(3), 69.112(d)(2), 69.112(d)(3), 69.114(b), 69.114(d), 69.205(e), 69.301 through 69.310, and 69.401 through 69.412. The computation of rates pursuant to these provisions by telephone companies subject to price cap regulation, as that term is defined in § 61.3(v) of this chapter, shall be governed by the price cap rules set forth in Part 61 of this chapter and other applicable Commission Rules and orders.

3. Section 69.3 is amended by revising paragraphs (a) and (e)(4), and by adding new paragraphs (h) and (i) to read as follows:

§ 69.3 Filing of access service tariffs.

(a) Except as provided in paragraphs (f) and (g), a tariff for access service shall be filed with this Commission for an annual period. Such tariffs shall be filed on a minimum of 90 days' notice with a scheduled effective date of July 1. Such tariff filings shall be limited to rate level changes.

* * * * *

(e) * * *

(4) Except for charges subject to price cap regulation as that term is defined in § 61.3(v) of this chapter, any charge in such a tariff that is

not an association charge must be computed to reflect the combined investment and expenses of all companies that participate in such a charge;

* * * * *

(h) Local exchange carriers subject to price cap regulation as that term is defined in § 61.3(v) of this chapter, shall file with this Commission a price cap tariff for access service for an annual period. Subject to § 61.48, such tariffs shall be filed to provide a minimum of 90 days' notice with a scheduled effective date of July 1. Such tariff filings shall be limited to changes in the Price Cap Indexes, rate level changes (with corresponding adjustments to the affected Actual Price Indexes and Service Band Indexes), and the incorporation of new services into the affected indexes as required by § 61.49 of this chapter.

(i) The following rules apply to the withdrawal from Association tariffs by telephone companies electing to file price cap tariffs pursuant to § 69.3(h).

(1) In addition to the withdrawal provisions of § 69.3(e)(9), a telephone company or group of affiliated telephone companies that participates in one or more Association tariffs during the current tariff year and that elects to file price tariffs effective July 1, 1991, shall notify the Association not later than December 31, 1990, that it is withdrawing from all Association tariffs effective June 30, 1991, subject to the terms of this Rule.

(2) Such withdrawal shall only be filed for the purpose of becoming eligible to file price cap tariffs effective July 1, 1991.

(3) Notwithstanding the provisions of § 69.3(e)(9), in the event a telephone company or group of affiliate telephone companies withdraws from all Association tariffs for the purpose of filing price cap tariffs, such companies may exclude from such withdrawal any or all affiliates that qualify as "average schedule" companies under §§ 69.605 and 69.606 provided that all affiliates so excluded are clearly specified in the withdrawal.

(4) If a telephone company elects to withdraw from Association tariffs and thereafter becomes subject to price cap regulation as that term is defined in § 61.3(v) of this chapter, neither such telephone company nor any of its withdrawing affiliates shall thereafter be permitted to participate in any Association tariffs.

4. Sec. 69.101 is revised to read as follows:

§ 69.101 General.

Except as provided in § 69.1 and Subpart C of this part, charges for each access element shall be computed and assessed as provided in this subpart.

5. Sec. 69.105 is amended by adding paragraphs (b)(7) and (b)(8), to read as follows:

§ 69.105 Carrier Common Line.

* * * * *

(b) * * *

(7) The Carrier Common Line charges of telephone companies that are subject to price cap regulation as that term is defined in § 61.3(v) of this chapter, shall be computed at the level of Carrier Common Line access element aggregation selected by such telephone companies, subject to § 69.3(e)(7). For each such Carrier Common Line access element tariff, the premium originating Carrier Common Line charge shall be one cent per minute. The premium terminating Carrier Common Line charge shall be set at a level that, when aggregated with the one cent originating charge and the non-premium originating and terminating carrier common line charges, shall not cause the aggregate carrier common line charge for the common line basket to exceed the capped charge computed pursuant to § 61.46(d) for that basket. The non-premium charges shall be equal to .45 multiplied by the premium charges.

(8) If the calculations described in subparagraph (b)(7) of this section result in a per minute charge on premium terminating minutes that is less than one cent, the originating and terminating charges shall be equal, and set at a level that does not cause the aggregate carrier common line charge for the common line basket to exceed the capped charge computed pursuant to § 61.46(d). The non-premium charges shall be equal to .45 multiplied by the premium charge.

* * * * *

6. Section 69.111 is amended by revising paragraph (a) to read as follows:

§ 69.111 Common transport.

(a) A charge that is expressed in dollars and cents per access minute shall be assessed upon all interexchange carriers that use (1) switching or transmission facilities that are apportioned to the Common Transport element for purposes of apportioning investment, or (2) equivalent facilities offered by carriers subject to price cap regulation as that term is defined in § 61.3(v) of this chapter.

* * * * *

7. Section 69.112 is amended by revising paragraph (b)(1), the first sentence of paragraph (c), and paragraph (d)(1) to read as follows:

(b) * * *

(1) Such charges shall be assessed upon all interexchange carriers for the interface arrangements they use to provide interstate or foreign services and for the equivalent arrangements offered by companies subject to price cap regulation as that term is defined in § 61.3(v) of this chapter.

(c) Charges for the use of voice grade transmission facilities shall be assessed upon interstate carriers that use such facilities to provide interstate or foreign services and for the use of equivalent facilities offered by companies subject to price cap regulation as that term is defined in § 61.3(v) of this chapter.

(d) * * *

(1) Such charges shall be assessed upon all interexchange carriers that use conditioning arrangements in the provision of interstate and foreign services and those that use equivalent arrangements offered by companies subject to price cap regulation as that term is defined in § 61.3(v) of this chapter.

8. Section 69.113 is amended by revising paragraph (c) to read as follows:

§ 69.113 Non-Premium Charges for MTS-WATS Equivalent Services.

* * * * *

(c) For telephone companies that are not subject to price cap regulation as that term is defined in § 61.3(v) of this chapter, the non-premium charge for the Local Switching element shall be computed by multiplying a hypothetical premium charge for such element by .45. The hypothetical premium charge for such element shall be computed by dividing the annual revenue requirement for each element by the sum of the projected access minutes for such element for such period and a number that is computed by multiplying the projected non-premium minutes for such element for such period by .45. For telephone companies that are price cap carriers, the non-premium charge for the Local Switching element shall be computed by multiplying the premium charge for such element by .45. Through December 31, 1992, the non-premium charge shall be computed by multiplying the LS1 charge for such element by .45.

* * * * *

9. Section 69.114 is amended by revising paragraph (a) to read as follows:

§ 69.114 Special access.

(a) Appropriate subelements shall be established for the use of equipment or facilities that are assigned to the Special Access element for purposes of apportioning net investment, or that are equivalent to such equipment or facilities for companies subject to price cap regulation as that term is defined in § 61.3(v) of this chapter.

* * * * *

10. Section 69.205 is amended by revising paragraph (c) to read as follows:

§ 69.205 Transitional premium charges.

* * * * *

(c) Except for telephone companies subject to price cap regulation, as that term is defined in § 61.3(v) of this chapter, the charge for an LS2 premium access minute shall be computed by dividing the premium Local Switching revenue requirement by the sum of the projected LS2 premium access minutes and a number that is computed by multiplying the projected LS1 premium access minutes by the applicable LS1 transition factor. For all telephone companies, the charge for an LS1 premium access minute shall be computed by multiplying the charge for an LS2 premium minute by the applicable LS1 transition factor. For telephone companies that are not subject to price regulation, as that term is defined in § 61.3(v) of this chapter, the premium Local Switching revenue requirement shall be computed by subtracting the projected revenues from non-premium charges attributable to the Local Switching element from the revenue requirement for each element.

APPENDIX C

A STUDY OF LOCAL EXCHANGE CARRIER POST-DIVESTITURE SWITCHED ACCESS PRODUCTIVITY

by J. Christopher Frentrup and Mark I. Uretsky[1]

1. This study, using data submitted by the United States Telephone Association (USTA), examines switched access revenue, cost, and demand data from June 1984 through June 1991 in order to determine the productivity offset, or "X factor" which would have been necessary to give the same prices in 1991 under the Commission's Balanced 50/50 price cap plan as should have occurred under rate of return regulation in that period.[2] We find that this X factor is approximately 3.5 percent on a historical basis. Depending on the assumptions made regarding future growth in demand and the percent of common line revenues which come from Subscriber Line Charges (SLCs), the X factor on a prospective basis ranges between approximately 3.3 and 3.6 percent. As in our original study,[3] the value of X is very sensitive both to the time period chosen for the starting point of the analysis and to changes in the formula used for the price cap index (PCI).

2. The original version of this study used data submitted by USTA and by the American Telephone and Telegraph Company (AT&T)[4] to examine switched access revenue, cost, and demand data from June 1984 through December 1989 in order to determine the X factor which would have been necessary to give the

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1 Mr. Frentrup is Senior Economist, and Mr. Uretsky is Senior Supervisory Economist, for the Tariff Division, Common Carrier Bureau, Federal Communications Commission.

2 The Balanced 50/50 cap approach is presented in Appendix E.

3 See Policy and Rules Concerning Rules for Dominant Carriers, CC Docket No. 87-313, Supplemental Notice of Proposed Rulemaking, 5 FCC Rcd 2176 (1990) Supplemental Notice.

4 See Public Notice DA 90-114 (Action in CC Docket 87-313; Common Carrier Bureau Seeks Post-Divestiture Productivity Data for Local Exchange Carriers), released Jan. 29, 1990. See also Letter from Associate General Counsel, USTA to Chief, Common Carrier Bureau, Feb. 9, 1990; Letter from Director, Federal Regulation Division, AT&T, to Chief, Common Carrier Bureau, Feb. 9, 1990; and Letter from Associate General Counsel, USTA, to Chief, Common Carrier Bureau, Feb. 20, 1990 (post-divestiture data).

same prices in 1989 under the Commission's originally proposed 50/50 price cap plan as should have occurred under rate of return regulation in that period.[5] That study found the X for this plan to be approximately 4 percent. This study, wich revises some of the 1984 to 1989 data and adds 1990/1991 data finds that the X for the originally proposed 50/50 plan is approximately 4.1 percent on a historic basis. On a prospective basis, the X factor ranges from approximately 3.7 to approximately 4.7 percent, depending on the assumptions made as to demand growth and the percent of common line revenues which come from SLCs. The current study reflects several revisions to the methodology and the data used in the original study, which are outlined below.

I. BACKGROUND

3. Both USTA and AT&T had submitted studies of LEC post-divestiture access productivity.[6] These studies gave disparate results, with USTA finding differential productivity[7] of about 2 to 3 percent, and AT&T finding differential productivity of 6 to 7 percent. The Common Carrier Bureau obtained post-divestiture data from both AT&T and USTA to attempt to determine the cause of this discrepancy. The analysis described in our initial study was performed on both the data provided by USTA and the data provided by AT&T. We found that both sets of data, if treated consistently, provided approximately the same estimates of productivity. The difference between

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5 USTA also submitted special access revenue, cost, and price index data. The price index data submitted was a subset of the total special access demand, including only certain services. These services accounted only for appoximately 68 percent of special access revenues in the 1985-86 period and only approximately 63 percent in 1989. In addition, there was an important discontinuity in the price index time series, due to the inclusion of WATS data beginning in 1986-87. For these reasons, the price index series appears not to provide sufficient or comparable data for the estimation of special access productivity and we were unable to analyze special access productivity in the initial study. We have also been unable to analyze special access productivity in our further study outlined in this Appendix.

6 See Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd 2873 (1989) and Erratum, 4 FCC Rcd 3379 (1989) (together Second Further Notice), Appendix E, note 5 for citation of these studies in 1988. See also AT&T's Comments, June 19, 1989 at Appendix A and USTA Reply, Aug. 3, 1989 at Attachment C (July 24, 1989 Report by National Economic Research Associates, Inc., "Analysis of AT&T's Comparison of Interstate Access Charges Under Incentive Regulation and Rate of Return Regulation").

7 Differential productivity is productivity which differs from the average achieved by the economy as a whole.

USTA's and AT&T's studies appeared to lie in the different assumptions and methodological treatment given the data, rather than in major differences in the data underlying the various studies.

4. Several commenters noted various alleged methodological flaws and data problems with our initial study. As discussed below, we have revised our study to reflect the criticisms we see as valid. We also discuss the reasons we have not made certain other suggested changes.

II. METHODOLOGY

5. For each of the six post-divestiture periods -- June 1984 through May 1985 (1984/1985), June 1985 through May 1986 (1985/1986), July 1986 through June 1987 (1986/1987), calendar year 1988 (1988), April 1989 through December 1989, annualized (1989), and July 1990 through June 1991 (1990/1991) -- this study computes common line rates, traffic sensitive rates, and total switched access rates on a per minute of use basis. In computing these rates, revenues are adjusted for the exogenous changes which would have been reflected in the price cap index for both the common line and traffic sensitive baskets. These changes were (1) the transition of the subscriber plant factor (SPF) to 25 percent; (2) the revised separations treatment of local commercial operations expense (Account 645); (3) the direct assignment of closed-end WATS lines to the special access category; (4) the implementation of reserve deficiency amortizations to compensate for inadequate depreciation levels; (5) the effects of the 1986 Tax Reform Act; (6) the revised separations calculation of the dial equipment minutes (DEM) factor; (7) the revised separations treatment of central office equipment category 4 terminations; (8) the revised separations treatment of revenue accounting expenses (Account 662); (9) the adoption of a new Uniform System of Accounts (Part 32) in place of Part 31, including conformance of Parts 36 and 69 of the Rules to Part 32; and (10) the revised treatment of pension expenses.

6. In addition, we make several other adjustments to revenue: (1) the effects of the Universal Service Fund (high cost fund) are removed from common line revenue; (2) traffic sensitive revenue and common line revenue are recast to earn 12.00 percent, the currently authorized rate of return;[8] (3) the costs of conversion to equal access are removed;[9] (4) revenue requirements for

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8 It appears that changes in the cost of capital used in the computation of the GNP-PI have not adequately parallelled the reduction in the LECs' interstate rate of return from 12.75 percent to 12.00 percent in 1987. As a result, equalization of the authorized rates of return appears to be necessary.

9 Despite this adjustment, the problems in estimating the cost effect of migration of Feature Group A and B minutes to Feature Group D minutes remains unsolved. See Second Further Notice at Appendix E.

inside wire and customer premise equipment are removed and (5) demand quantities (minutes of use) are adjusted for exogenous stimulation caused by the introduction of subscriber line charges and by the exogenous changes listed above.

7. By making these adjustments, revenues and demand quantities for each of the periods under study are adjusted to a comparable base, enabling us to make an inference regarding the level of productivity. Revenues and demand for each year are adjusted to reflect 1990/1991 conditions and levels of exogenous factors since such conditions and levels best reflect future conditions and levels, and therefore, future productivity.

8. Common line, traffic sensitive and total switched rates in each of the six periods are computed by dividing revenue, adjusted as described above, by demand, adjusted as described above. In our original study, the annual growth rates for the adjusted common line, traffic sensitive and total switched access rates were computed using a logarithmic trend line regression through the data points.[10] The X factor that yields these annual growth rates, given the growth in the GNP-PI and g, were then computed using formulas derived from the proposed PCI formulas. Use of this method effectively implies, as USTA correctly notes[11], that there was only one price cap update filing. We have revised our method as follows.

9. Trend line regressions are used to estimate the beginning (1984/1985) and ending (1990/1991) common line, traffic sensitive switched and total switched rates. The proposed formulas, reflecting the historical values of growth in minutes of use per line ("g" in the "Balanced 50/50 formula," the common line PCI formula adopted in this Order) and GNP-PI are then applied five times to the 1984/1985 rates to obtain the 1990/1991 price cap rates. The value of X is chosen such that the 1990/1991 price cap rates equal the 1990/1991 rates estimated by the trend line regression.[12]

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10 Application of a regression technique (finding the line which best fits the data points scattered on a graph) allows us, in essence, to compute the average price change per year for the post-divestiture period, despite the fact the year-to-year price changes varied widely.

11 See USTA Comments at Attachment B, page 8.

12 USTA also notes that the GNP-PI data that should be used in our study is the GNP-PI data that would have been available at the time of each of the filing. See USTA Comments at Attachment B, page 7. We agree, and have revised the GNP-PI data used in our study to reflect that data.

10. For the common line basket, an historical X is computed using the Balanced 50/50 formula, the per line formula, and the originally proposed 50/50 formula. In the Balanced 50/50 formula, this X is 3.31 percent. In the per line formula, this X is 2.32 percent. In the originally proposed 50/50 formula, this X is 4.38 percent. For the traffic sensitive basket, the historical X is computed using the traffic sensitive formula proposed in the Second Further Notice (the "GNP-PI - X" formula). In this GNP-PI - X formula, the X is 3.64 percent.

11. These estimates measure the X that would be used in the common line formula and traffic sensitive formula for the PCI if a different X were used in each basket. The current proposal, however, is to use one X for both baskets. In addition, the value of X in both the Balanced 50/50 and the originally proposed 50/50 formulas which will give the same change in the rate as under rate of return depends on the assumptions made about the values of three parameters: g, GNP-PI, and the percent of common line revenue which is recovered by SLCs. We must therefore determine the unitary X which will, when used in the 50/50 common line PCI formula and the GNP-PI - X traffic sensitive PCI formula, give the same percentage change in the total switched access rate that we expect under rate of return given our assumptions about the expected value of the three parameters.

12. We determine the unitary X to be used in both the common line PCI formula and the traffic sensitive PCI formula by a two step process. First, the percentage change in the carrier common line (CCL) rate is computed on a historical basis using the formula

$$(1) \quad \% \text{ Change CCL} = \frac{[\ (CL * (\% \text{ Change in PCI})) + (SLC * g/(1+g))\ ]}{[\ CL - SLC\ ]}$$

for the per line and the initially proposed 50/50 formulas, and

$$(2) \quad \% \text{ Change CCL} = \frac{[\ (CL * (\% \text{ Change in PCI})) + (SLC * (g/2) / (1 + (g/2)))\ ]}{[\ CL - SLC\ ]}$$

for the Balanced 50/50 PCI, where CL and SLC are the computed common line per minute rate and the computed subscriber line charge per minute rate,[13] and the percentage change in the traffic sensitive rate is computed using the formula

$$(3) \quad \% \text{ Change TS} = \% \text{ Change in PCI} = GNPPI - X$$

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13 Equivalently, given a fixed base of minutes, they are, respectively, common line revenues and subscriber line charge revenues.

A weighted average of these two changes is obtained by multiplying equation (1) or (2), depending on the formula, by the ratio of CCL revenue to common line plus TS revenue and multiplying equation (3) by the ratio of TS revenue to common line plus TS revenue and summing. This weighted average is computed using the separate X's computed for the historical per line CL PCI and the TS PCI. A unitary X is then chosen such that the weighted average change in CCL and TS rates using the unitary X is equivalent to the weighted average change in CCL and TS rates using the separate X's. Second, a unitary X is chosen for the Balanced 50/50 CL PCI and the GNPPI - X TS PCI such that the weighted average change in the CCL and TS rates is the same as for the unitary X used in the per line CL PCI and the TS PCI. A unitary X for the originally proposed 50/50 CL PCI and the TS PCI formulas is also computed in the same manner.

13. The percentage change in the total switched access rate that we expect would occur under rate of return in the near future is given by the percentage change in that rate using the historical X values in the per line common line PCI formula and the GNP-PI - X traffic sensitive formula, together with assumptions concerning the three parameters. We assume that the growth in minutes of use will be 8 percent, growth in lines will be 3.1 percent, growth in GNP-PI will be 3.9 percent, and the percent of common line revenue which is recovered by SLCs will be 61.38 percent. If we make these assumptions, the X for total switched access using the Balanced 50/50 CL PCI and the TS PCI formulas is 3.43 percent. If alternatively we assume that growth in minutes of use is 10 percent rather than 8 percent, the X factor is 3.61 percent. The X's for total switched access using the originally proposed 50/50 CL PCI and the TS PCI formulas under the same assumptions are 4.17 and 4.65 percent, respectively.

III. CRITICISMS AND CHANGES IN ORIGINAL STUDY

14. In addition to the changes outlined above, other changes were suggested by commenters. USTA noted that the High Cost Fund was not included in common line revenues in 1989, and should not have been removed from that year.[14] We have made this change. In addition, USTA notes that the FIT/SLIT gross-up factor for the traffic sensitive category was incorrectly used in the common line category.[15] This was done because, up until 1989, the common line factor reported by USTA incorrectly reflected only federal taxes. However, we have changed the factors used in the common line category to reflect the common line factor for 1989 and 1990/1991, and have continued to use the traffic sensitive factor for all earlier years.

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14 USTA Comments, Attachment B at 8.

15 Id.

15. USTA cites two other minor adjustments it believes should not have been made. The first is that our study reduced the tax reform exogenous change for removal of equal access revenues, the only exogenous change so treated.[16] We continue to believe this is the correct way to treat this change, since equal access costs are to a large degree capital costs and amortizations and taxes on those items. The other adjustment USTA cites is the removal of Inside Wire (ISW) and Customer Premises Equipment (CPE) amounts from the SPF transition exogenous change.[17] This adjustment is not needed, they argue, because the effect of SPF transition is almost entirely confined to an effect on Base Factor Portion (BFP), with minimal effect on ISW and CPE. We believe, however, that USTA is mistaken in its belief that the effect is solely on BFP.

16. USTA argues that we should have treated three further exogenous changes in a different manner. The first of these is the adjustment of the data for the actual rate of return (ROR). We made two adjustments for rate of return; a one time adjustment for the change in the allowed rate of return, and an adjustment of each year to the allowed rate of return. USTA agrees with the first adjustment, but argues that we should not have made the second, because the X we want is the X which exactly reproduces ROR regulation as it worked in actual practice. We disagree with USTA on this point, since we do not feel that the X we should choose should institutionalize the imperfections of the access review and monitoring process.

17. The second adjustment which USTA would have us treat differently is the removal of equal access. It argues access expenses should not have been removed for several reasons. First, there is a difficulty in measuring cost changes. Some expenses (e.g., installation of tandems) may not have been measured. Also, switch upgrades which may have occurred even without equal access may have been included. Second, there may have been changes in output quantity and quality. Equal access expenses generated higher quality output (FGD MOU) which led to growth in output by AT&T's competitors. Since the FGD price was fixed at an arbitrary multiple of FGA/B price, increase in quality was not reflected as an increase in output. Thus, in adjusting expenses for equal access conversion, some adjustment for demand quality must be made to avoid bias in measurement of X. Also, some of the increase in demand which occurred after 1984 must have been due to equal access. Third, the shift from non-premium to premium MOU causes changes in separations factors, which results in reduced local switching costs per minute. USTA notes that the net effect of these is hard to quantify, but making no adjustment for equal access loweres X by about 0.3 percentage points.

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16 ID. at 4-5.

17 Id. at 8-9.

18. The Commission adopted a stringent definition of the costs to be included in equal access, which included only pre-subscription costs and the upgrade of end offices to FGD. Thus, there may be some costs which were a result of equal access, which we cannot quantify, which were not recovered in the equal access element. USTA's argument that the conversion to equal access may have caused some of the observed demand stimulation may be correct, as may its argument regarding the effect on separations factors. Considering these two items together, it is unclear in which direction the bias lies. We do not believe that simply making no adjustment for equal access is the reasonable solution to the problem.

19. USTA also argues that the reserve deficiency amortizations (RDA) should not have been treated as an exogenous change in our study.[18] It argues that an examination of post-divestiture depreciation expenses reveals that the regional Bell operating companies (RBOCs) were requesting and receiving increased depreciation rates up until the RDAs were implemented effective on January 1, 1987. After that date, the depreciation rates remained stable or fell. Thus, USTA argues, the RDA "reflected a single event that formalized an increase in depreciation expense".[19] The RDA was not a one time event; instead, it affected subsequent LEC depreciation cost changes, and should therefore not be removed from the analysis.

20. We partially agree with USTA's contention. The RDAs were an alternate method of adjusting the RBOCs' depreciation expenses to reflect shorter plant lives. Prior to implementing the RDAs, the Commission had been granting higher depreciation rates to the RBOCs to make up for depreciation reserve deficiencies. These higher depreciation rates reflected not only the actual depreciation rate of the plant, but also an additional increment to adjust for the earlier years when the allowed depreciation rate had been lower than the actual depreciation rate. With the implementation of the RDAs, the depreciation rates were set at the actual depreciation rate, and the additional increment was recovered in the RDA. The adjustment that needs to be made to the RDA exogenous change amount is thus to remove the amount of the increment from the RDA. This has been done in our present study by computing the ratio of this increment to the RDA amount for the RBOCs and multiplying this ratio by the reported RDA amounts.

21. Some commenters object to our inclusion of the 1984 data point in the analysis.[20] AT&T analyses the 1984 data point and cites several reasons

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18 USTA Reply, Attachment B at 10-12.

19 USTA Reply, Attachment B at 11.

20 Ad Hoc Comments at 8-9 and Appendix A; AT&T Comments at 6-9 and Appendix C.

to reject it as being a statistical outlier. It inserts a dummy variable for 1984 into the log trend model, and finds that the dummy variable is significantly different from zero. It also uses a model with only a dummy varible and finds the dummy variable is still significantly different from zero. A linear trend model with a dummy variable also shows a significant dummy variable.

22. AT&T also uses 1984 as a starting point and draws a line from 1984 to each of the later years. The line so created does not pass through any of the other points. Thus, AT&T argues, this 'determistic' model should not be used. The trend model should also not be used, AT&T states, because it has a very low t-statistic on the trend variable. If a regression model is to be used, it alleges one which has no trend provides a better fit than the regression used. AT&T's preferred model is to use a regression excluding the 1984 data point. This provides a better fit and a slope significantly different from zero. This line, AT&T avers, is also consistent with the rates that the LECs filed to go into effect on July 1, 1990.

23. Ad Hoc makes a similar point. Ad Hoc notes that the R-squared values for the regressions are very low, and that the t-statistics on the trend variable are also low. In addition, they perform a Chow test to determine whether the 1984 data point is significantly different from the other data points, and find that it is.

24. In addition to these statistical arguments against the inclusion of the 1984 data point, AT&T has attempted to uncover possible reasons why the 1984 revenue data may be understated and to quantify the effect of the understatement. They note that some LECs were not assessing access charges on their interexchange and corridor traffic in 1984/1985, and may not have included these revenues and costs for that year. USTA has examined the data for the year and determined that some companies did exclude those revenues and costs for 1984/1985. They revised the revuene data upward by $125.9 million and that data is reflected in this study.

25. AT&T also notes that the Directory Assistance rate was set at 25 cents in 1984/1985 even though the costs were shown to be higher. In addition, the costs of WATS dedicated access line extensions, which should have been included in traffic sensitive costs, were incorrectly included in special access costs for setting rates in 1984/1985. Thus 1984/1985 TS revenue will be understated. However, as USTA argues, as long as the average net investment is reported correctly, these two problems are corrected by our adjusting the 1984/1985 revenue to reflect a fixed rate of return. USTA has examined the data it submitted and states that the average net investment was reported correctly. Thus we have not reflected this change in the current study.

26. AT&T also notes that GTE and United cited in support of their TS rate increases in 1985/1986 the fact that AT&T's redeployment of its points of presence was causing a one time increase in its costs. This point, however,

seems to argue that the 1985/1986 data point should be adusted downward, rather than that the 1984/1985 point should be adjusted upward. This change is not reflected in the current study, because there is not sufficient information on which to make a reasonable adjustment.

27. AT&T also argues that 1984/1985 demand was higher than the trend of later data because of problems with the provisioning of special access. These problems caused minutes to remain on the switched network which would otherwise have migrated to special access. Thus, demand should be lower, giving a higher adjusted traffic sensitive per minute rate. This adjustment seems speculative and not accurately quantifiable. We have not reflected this in the current study.

28. We continue to believe that the best way to estimate the overall growth between 1984/1985 and 1990/1991 is to use a trend regression over the entire time period. While we grant that this gives a model with a low R-squared value and a trend variable with a low t-statistic, we still believe that an averaging technique using all post-divestiture data gives a more complete picture of LEC post-divestiture productivity than would result from excluding one year. The statistical tests which show that the 1984/1985 data point is an outlier are merely indications that the data point needs to be examined closely. That examination has been given and the data point has been adjusted to reflect the changes identified.

29. The final point we have to consider is the amount of demand stimulation. We have reflected in our study the amount of demand stimulation reported by USTA in its ex parte submission of August 6, 1990. This estimate assumes that the demand function for interstate minutes is

$$q = A * p^{e}$$

where q is quantity demanded, p is price, e is the elasticity of demand and A contains all variables that affect demand other than price. Demand stimulation is then given by the formula

$$\text{Stimulation} = q * [1 - (R1 / RO)^{(e/1+e)}]$$

where q is observed demand, RO is observed CCL plus TS revenue, R1 is RO plus SLC revenue plus the exogenous changes, and e is the elasticity of demand, multiplied by the proportion of interexchange carrier revenues which are access. USTA assumed a constant long run elasticity of -0.723 and a constant access fraction of 0.45 in computing its estimate of stimulation. AT&T notes that the elasticity number used should reflect the intertemporal nature of stimulation, and thus that a first year elasticity of -0.47 and long run elasticity of -0.68 should be used. Also, AT&T notes that the access fraction for it has been declining over time, and is currently below 0.45. Making these two changes, AT&T states, would result in a lower estimate of stimulated demand.

30. We believe USTA's estimate of stimulated demand is reasonable. The elasticity factors that both AT&T and USTA use are estimated from time series data, and thus have associated variances. There is also some uncertainty about the correct access fraction to use. Presumably, the other interexchane carriers access fractions differ from AT&T's and have been rising over time as they have begun paying premium access rates as equal access is implemented. As these carriers market share has increased, the proportion of their expenses which are access becomes more important in determining the industry access fraction. Also, the access fraction that both USTA and AT&T propose is the access fraction that actually existed in each year. A reasonable argument can be made that the correct fraction to be used in the fraction that would result if the SLC revenue and exogenous changes were added back on to access costs in each year. This would result in a higher access fraction. The access fraction and demand elasticity that USTA used thus appear to be reasonable estimates which adequately balance these offsetting factors.

TREND LINE REGRESSION
COMPUTATION OF X FACTORS

Beginning trend line CL/MOU rate, beginning trend line TS/MOU rate, and ending trend line total switched rate are computed in Chart TREND. On a historic basis, we compute the X in the balanced 50/50 CL PCI formula, the X in the per line CL PCI formula, the X in the initially proposed 50/50 CL formula, and the X in the TS PCI formula. On a prospective basis, we compute a unitary X, the X which, when used in the CL PCI formula and applied to the estimated beginning trend line CL/MOU rate, and in the TS PCI formula and applied to the estimated beginning trend line TS/MOU rate, will give ending CL/MOU and TS/MOU rates which sum to the ending trend line Total Switched rate. A prospective unitary X is computed for use with the TS PCI and each of the per line, balanced 50/50, and initially proposed 50/50 CL PCI formulas.

	CL	TS	Unitary
Historic X's			
Per Line CL PCI	2.32%	na	2.97%
Balanced 50/50 CL PCI	3.31%	na	3.49%
Initially proposed 50/50 CL PCI	4.38%	na	4.08%
TS PCI	na	3.64%	na
Prospective X's			
Per Line CL PCI	na	na	2.97%
Balanced 50/50 CL PCI	na	na	3.43%
Initially proposed 50/50 CL PCI	na	na	4.17%
TS PCI	na	na	na

DATA USED IN REGRESSIONS

This chart presents the adjusted CL/MOU and TS/MOU rates as computed in Chart RATE. The Total Switched/MOU rates are the sum of the TS/MOU and CL/MOU rates. CL MOU/Line is computed as the CL MOU adjusted for exogenous stimulation computed in Chart RATE divided by the Subscriber Lines. The numbers on the columns on this chart correspond to the numbers on the regressions on Chart REG.

	(1) CL/MOU	(2) TS/MOU	(3) TotSW/MOU	(4) CL MOU/LINE	TREND
6/84-5/85	$0.0305	$0.0244	$0.0549	1.8894	7
6/85-5/86	$0.0332	$0.0279	$0.0610	1.9004	19
7/86-6/87	$0.0358	$0.0272	$0.0631	1.9354	32
1988	$0.0309	$0.0274	$0.0583	2.1851	50
4/89-12/89	$0.0292	$0.0271	$0.0563	2.3073	63.5
7/90-6/91	$0.0277	$0.0255	$0.0532	2.4016	80
Log Trend Annual Growth	-2.45%	0.23%	-1.22%	4.56%	
Log Trend R-square	0.3936	0.0108	0.1925	0.9451	

DATA USED IN REGRESSIONS

This chart presents the adjusted CL/MOU and TS/MOU rates as computed in Chart RATE. The Total Switched/MOU rates are the sum of the TS/MOU and CL/MOU rates. CL MOU/Line is computed as the CL MOU adjusted for exogenous stimulation computed in Chart RATE divided by the Subscriber Lines. The numbers on the columns on this chart correspond to the numbers on the regressions on Chart REG.

	CL REV	CL MOU	TS REV	TS MOU	LINES
6/84-5/85	$6,333,273	207,772,422	$4,553,364	186,783,366	109,965,483
6/85-5/86	$7,141,522	215,343,084	$5,604,779	201,188,517	113,316,244
7/86-6/87	$8,049,472	224,625,813	$6,129,746	225,136,070	116,063,662
1988	$8,220,317	265,823,867	$7,229,553	263,972,545	121,654,374
4/89-12/89	$8,528,394	291,716,955	$8,001,639	295,351,330	126,432,081
7/90-6/91	$8,863,314	319,439,082	$8,353,356	327,897,259	133,009,705

DATA USED IN REGRESSIONS

This chart presents the adjusted CL/MOU and TS/MOU rates as computed in Chart RATE. The Total Switched/MOU rates are the sum of the TS/MOU and CL/MOU rates. CL MOU/Line is computed as the CL MOU adjusted for exogenous stimulation computed in Chart RATE divided by the Subscriber Lines. The numbers on the columns on this chart correspond to the numbers on the regressions on Chart REG.

GNP-PI: Source is Survey of Current Business for month shown, column J, Table 7.1 for all years except the 02/85 one, in which the data is from Table 7.2

4Q/83	227.6	02/85
4Q/84	237.1	02/85
4Q/84	110	02/86
4Q/85	113.8	02/86
2Q/86	114.7	09/87
2Q/87	118.6	09/87
3Q/87	119.7	12/88
3Q/88	124.9	12/88
4Q/88	126.2	03/90
4Q/89	131.4	03/90

LOGARITHMIC TREND REGRESSIONS

This chart presents the regression results of logarithmic time trend regressions on the CL/MOU rate, the TS/MOU rate, the Total Switched/MOU rate, and the CL MOU per line data presented in Chart DATA. The number of the regression output on this chart corresponds to the number on the data on Chart DATA.

(1) CL/MOU, 1984 - 1990

Regression Output:

Constant		0
Std Err of Y Est		0.07930378
R Squared		0.39360783
No. of Observations		6
Degrees of Freedom		4
X Coefficient(s)	-3.3832206	-0.0020663
Std Err of Coef.	0.06275079	0.00128239

(2) TS/MOU, 1984 - 1990

Regression Output:

Constant		0
Std Err of Y Est		0.05737638
R Squared		0.01082344
No. of Observations		6
Degrees of Freedom		4
X Coefficient(s)	-3.6372165	0.00019410
Std Err of Coef.	0.04540027	0.00092781

(3) TotSW/MOU, 1984 - 1990

Regression Output:

Constant		0
Std Err of Y Est		0.06479185
R Squared		0.19248555
No. of Observations		6
Degrees of Freedom		4
X Coefficient(s)	-2.8096100	-0.0010230
Std Err of Coef.	0.05126792	0.00104773

(4) CL MOU/LINE, 1984 - 1990

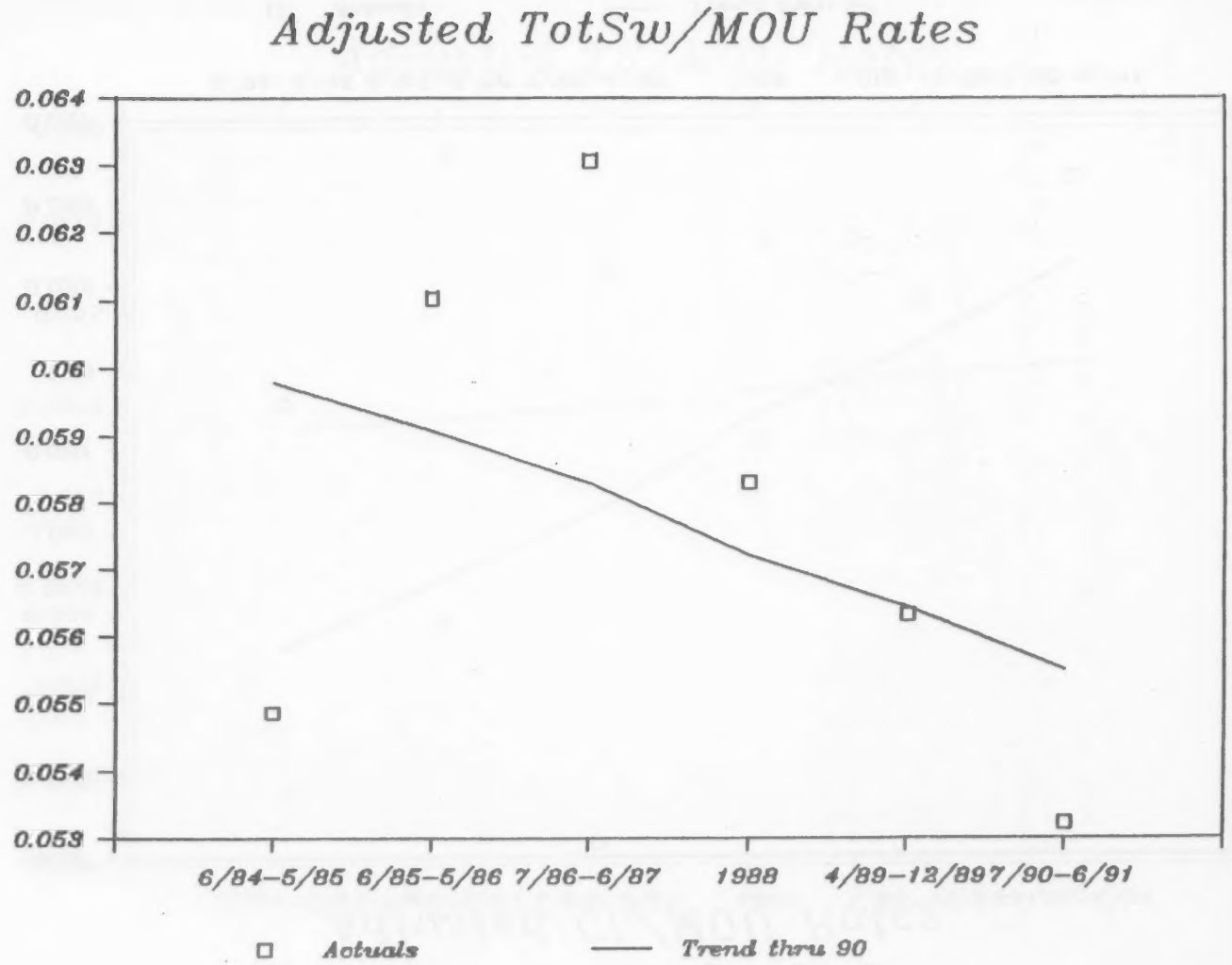
Regression Output:

Constant		0
Std Err of Y Est		0.02776368
R Squared		0.94513430
No. of Observations		6
Degrees of Freedom		4
X Coefficient(s)	0.58253569	0.00372677
Std Err of Coef.	0.02196860	0.00044895

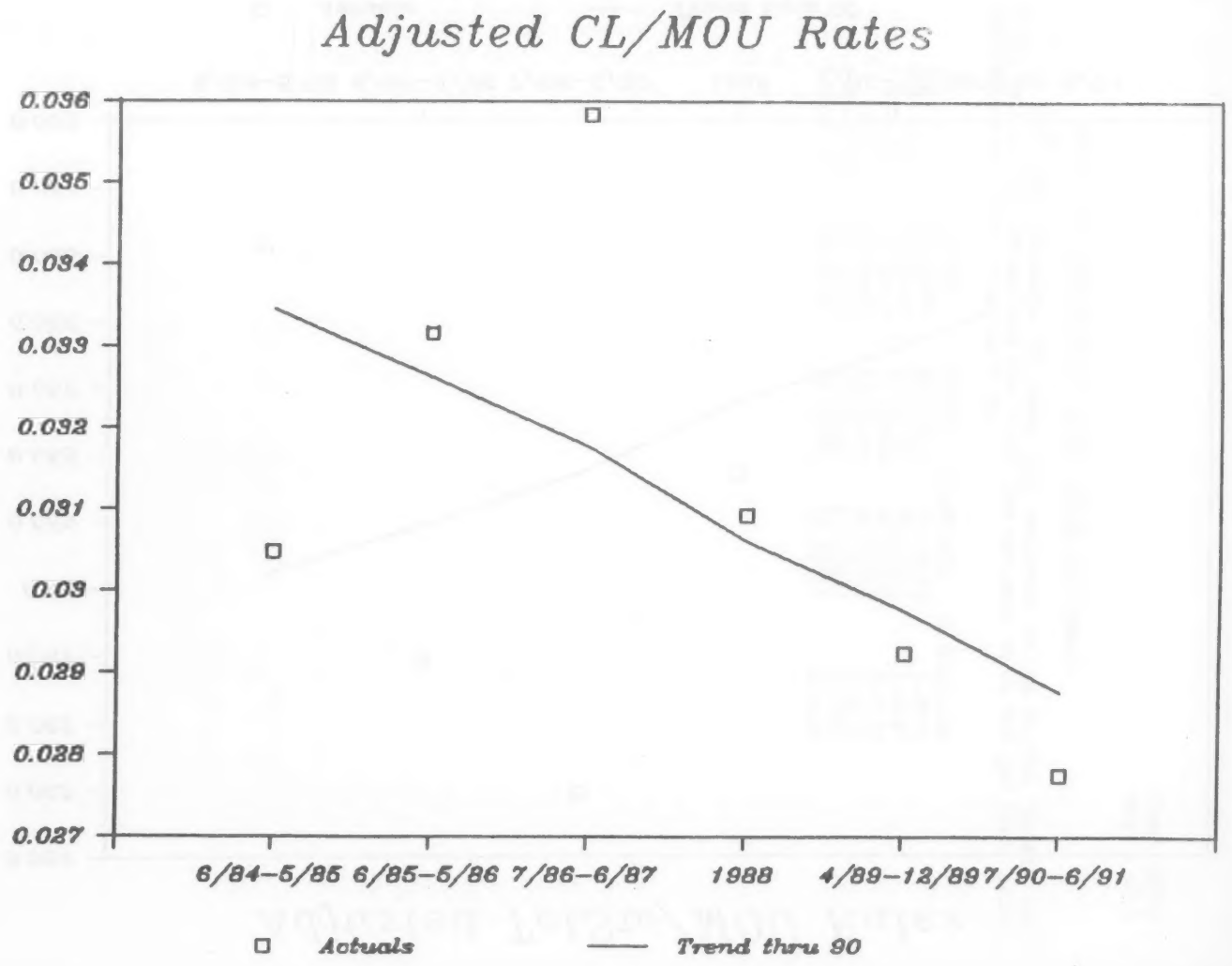
TREND LINE ESTIMATES OF ACCESS RATES AND DEMAND

This chart presents the trend line estimates of the CL/MOU, TS/MOU, and Total Switched/MOU rates, and the trend line estimate of CL MOU per Line, using the regression output from Chart REG.

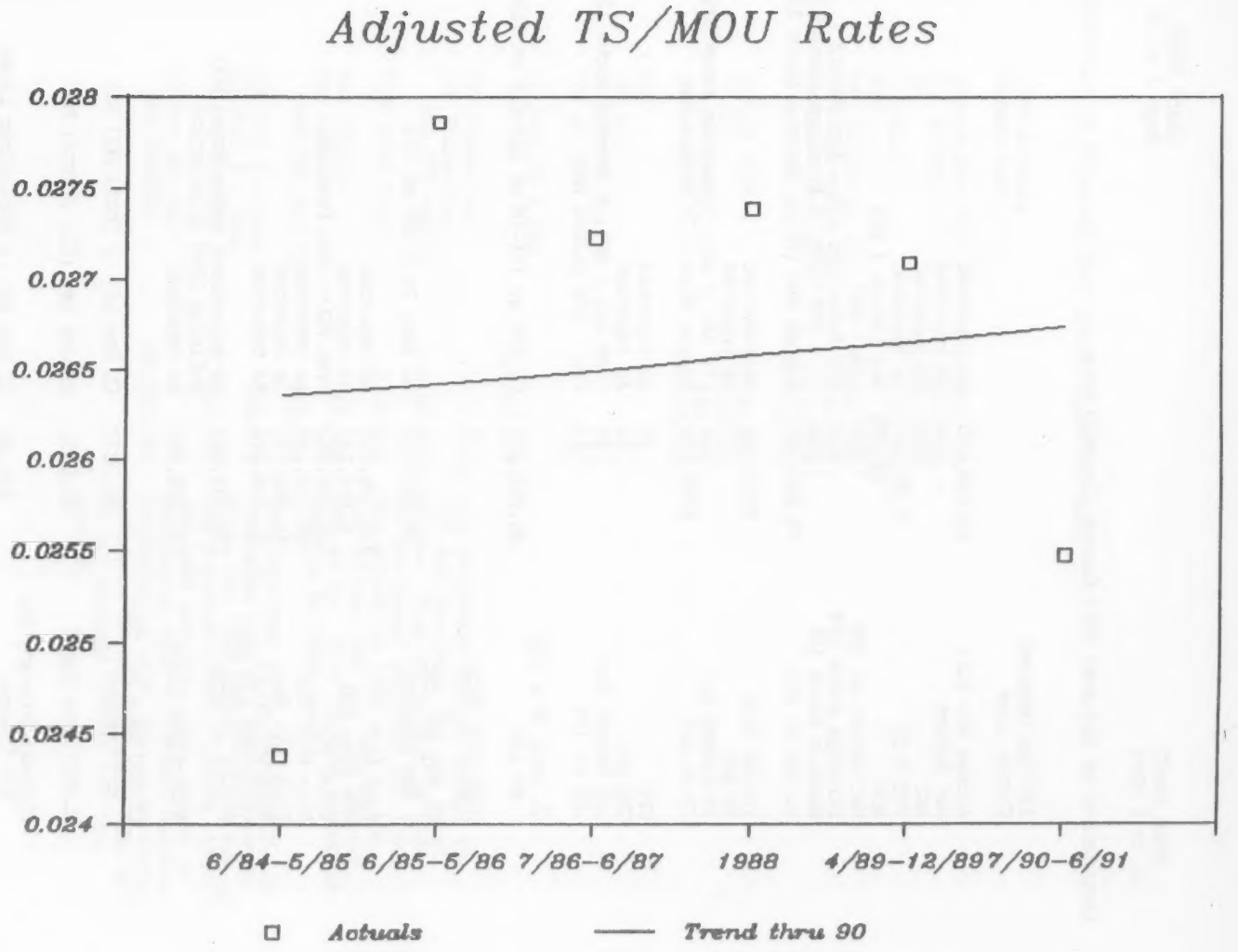
	CL/MOU	TS/MOU	TotSW/MOU	CL MOU/LINE
6/84-5/85	$0.03345	$0.02636	$0.05980	1.8379
6/85-5/86	$0.03263	$0.02642	$0.05907	1.9220
7/86-6/87	$0.03177	$0.02649	$0.05829	2.0174
1988	$0.03061	$0.02658	$0.05723	2.1573
4/89-12/89	$0.02976	$0.02665	$0.05644	2.2687
7/90-6/91	$0.02877	$0.02674	$0.05550	2.4125


Adjusted TotSw/MOU Rates
0.064
0.063
0.062
0.061
0.06
0.059
0.058
0.057
0.056
0.055
0.054
0.053
6/84–5/85
6/85–5/86
7/86–6/87
1988
4/89–12/89
7/90–6/91
Actuals
Trend thru 90

6903


Adjusted CL/MOU Rates
0.036
0.035
0.034
0.033
0.032
0.031
0.03
0.029
0.028
0.027
6/84-5/85
6/85-5/86
7/86-6/87
1988
4/89-12/89
7/90-6/91
Actuals
Trend thru 90

Actuals
Trend thru 90


Adjusted TS/MOU Rates
0.028
0.0275
0.027
0.0265
0.026
0.0255
0.025
0.0245
0.024
6/84-5/85
6/85-5/86
7/86-6/87
1988
4/89-12/89
7/90-6/91
Actuals
Trend thru 90

Computation of Adjusted 1990 Common Line/MOU Rate

1990 As Ordered Common Line		
Access Rev (CL)	$9,629,850	As reported
Net Return	n/a	As reported
ANI	n/a	As reported
FIT/SLIT	0.551244	As reported
ROR	12.00%	Net Return / ANI
Net Return at 12%	n/a	12% * ANI
Earnings above 12%	n/a	Net Return at 12% - Net Return
Revenue above 12%	n/a	(1 + FIT/SLIT) * Earnings above 12%
CL Rev at 12%	$9,629,850	Access Rev (CL) - Revenue above 12%
Inside Wire	$766,536	As reported
IW ANI	n/a	As reported
IW Excess Rev	n/a	(IW ANI / ANI) * Revenue above 12%
IW at 12%	$766,536	Inside Wire - IW Excess Rev
CPE	$0	As reported
CPE ANI	$0	As reported
CPE Excess Rev	$0	(CPE ANI / ANI) * Revenue above 12%
CPE at 12%	$0	CPE - CPE Excess Rev
CL less IW & CPE at 12%	$8,863,314	CL Rev at 12%-IW at 12%-CPE at 12%
High Cost Fund	0	
CL Rev Adj for Exo Changes	$8,863,314	CL less IW & CPE at 12%
Prem MOU	312,739,935	As reported
Non-Prem MOU	6,699,147	As reported
Total MOU	319,439,082	Prem MOU + Non-Prem MOU
Stim MOU: SLC	56,710,175	As reported
Stim MOU: Exo	44,885,731	As reported
Stim MOU:Total	83,216,292	As reported
Total MOU Adj for Incl of Stim	319,439,082	No adjustment made; Total MOU reflects 1990 stimulation
Subscriber Lines	133,009,705	As reported
CL/MOU Rate Adj for Exo Changes	$0.0277	CL Rev Adj / Total MOU Adj
CL/MOU Rate Unadj	$0.0301	Access Rev (CL) / Total MOU
CL/Loop Rate Adj for Exo Changes	$66.64	CL Rev Adj / Subscriber Lines
CL/Loop Rate Unadj	$72.40	Access Rev (CL) / Subscriber Lines

Computation of Adjusted 1989 Common Line/MOU Rate

1989 Actuals Common Line	
Access Rev (CL)	$9,727,121
Net Return	$1,897,225
ANI	$16,515,385
FIT/SLIT	0.558349
ROR	11.49%
Net Return at 12%	$1,981,846
Earnings above 12%	($84,621)
Revenue above 12%	($131,869)
CL Rev at 12%	$9,858,990
Inside Wire	$1,202,272
IW ANI	$720,071
IW Excess Rev	($5,750)
IW at 12%	$1,208,022
CPE	$0
CPE ANI	$0
CPE Excess Rev	$0
CPE at 12%	$0
CL less IW & CPE at 12%	$8,650,969
SPF Phase-Down	($177,662)
SPF Phase-Down less CPE and IW	($155,893)
High Cost Fund	$245,050
Tax Reform	$17,332
Tax Reform less CPE and IW	$15,208
COE Cat 3 - Dems	$20,639
COE Cat 3 - Dems less CPE and IW	$18,110
CL Rev Adj for Exo Changes	$8,528,394

All exogenous changes except the HCF are cumulated for all later years. Thus the effect in 1989 is the amount reported for 1990. The effect in 1988 will be the sum of the 1990 and 1989 amounts, and so on. This adjusts exogenous changes to 1990 levels.

The High Cost Fund, conversely, is cumulated over all previous years. Thus, the 1988 amount is the sum of the reported 1984/5, 1985/6, 1986/7, and 1988 amounts. This amount is subtracted from CL revenue because, beginning in 1989, HCF is no longer recovered in the CCL rate. The HCF is not removed in 1989 for this reason.

Computation of Adjusted 1989 Common Line/MOU Rate

Prem MOU	273,404,737
Non-Prem MOU	8,018,019
Total MOU	281,422,756
Stim MOU: SLC	43,374,442
Stim MOU: Exo	31,825,428
Stim MOU: Total	65,700,270
Stim MOU: Total @ 90	75,994,469
Total MOU Adj for Incl of Stim	291,716,955
Subscriber Lines	126,432,081
CL/MOU Rate Adj for Exo Changes	$0.0292
CL/MOU Rate Unadj	$0.0346
CL/Loop Rate Adj for Exo Changes	$67.45
CL/Loop Rate Unadj	$76.94

All exogenous changes except HCF and RDA are recast to remove the portion of the exogenous change reflected in the CPE and IW categories.

Total exogenous stimulation in each year prior to 1990 is recast to the 1990 level by multiplying the ratio of total 1990 Stim MOU to 1990 Total MOU less total Stim MOU, by the year's Total MOU less total Stim MOU

Computation of Adjusted 1988 Common Line/MCU Rate

	1988 Common Line
Access Rev (CL)	$10,012,595
Net Return	$2,030,613
ANI	$16,589,979
FIT/SLIT	0.607716
ROR	12.24%
Net Return at 12%	$1,990,797
Earnings above 12%	$39,816
Revenue above 12%	$64,012
CL Rev at 12%	$9,948,583
Inside Wire	$1,354,704
IW ANI	$985,445
IW Excess Rev	$3,802
IW at 12%	$1,350,902
CPE	$0
CPE ANI	$0
CPE Excess Rev	$0
CPE at 12%	$0
CL less IW & CPE at 12%	$8,597,681
SPF Phase-Down	($298,488)
SPF Phase-Down less CPE and IW	($257,957)
High Cost Fund	$184,651
Reserve Def Amort	$18,589
Tax Reform	$17,332
Tax Reform less CPE and IW	$14,979
COE Cat 3 - Dems	$34,656
COE Cat 3 - Dems less CPE and IW	$29,950
COE Cat 4 - Terms	$9,071
COE Cat 4 - Terms less CPE and IW	$7,839
Acct 662	($7,074)
Acct 662 less CPE and IW	($6,113)
CL Rev Adj for Exo Changes	$8,220,317

Computation of Adjusted 1988 Common Line/MOU Rate

Prem MOU	235,269,424
Non-Prem MOU	9,197,903
Total MOU	244,467,327
Stim MOU: SLC	31,694,745
Stim MOU: Exo	23,914,790
Stim MOU: Total	47,892,584
Stim MOU: Total @ 90	69,249,124
Total MOU Adj for Exo Changes	265,823,867
Subscriber Lines	121,654,374
CL/MOU Rate Adj for Exo Changes	$0.0309
CL/MOU Rate Unadj	$0.0410
CL/Loop Rate Adj for Exo Changes	$67.57
CL/Loop Rate Unadj	$82.30

Computation of Adjusted 7/86-6/87 Common Line/MOU Rate

7/86-6/87 Common Line	
Access Rev (CL)	$10,213,735
Net Return	$2,066,210
ANI	$17,655,505
FIT/SLIT	0.867188
ROR	11.70%
Net Return at 12%	$2,118,661
Earnings above 12%	($52,451)
Revenue above 12%	($97,935)
CL Rev at 12%	$10,311,670
Inside Wire	$1,116,361
IW ANI	$944,570
IW Excess Rev	($5,240)
IW at 12%	$1,121,601
CPE	$222,659
CPE ANI	$273,660
CPE Excess Rev	($1,518)
CPE at 12%	$224,177
CL less IW & CPE at 12%	$8,965,893

Computation of Adjusted 7/86-6/87 Common Line/MOU Rate

SPF Phase-Down	($470,726)
SPF Phase-Down less CPE and IW	($409,291)
High Cost Fund	$89,309
Reserve Def Amort	$63,236
Tax Reform	($436,275)
Tax Reform less CPE and IW	($379,337)
COE Cat 3 - Dems	$42,683
COE Cat 3 - Dems less CPE and IW	$37,112
COE Cat 4 - Terms	$11,996
COE Cat 4 - Terms less CPE and IW	$10,430
Acct 662	($26,718)
Acct 662 less CPE and IW	($23,231)
Conformance	($95,687)
Conformance less CPE and IW	($83,199)
FASB 87	($49,261)
FASB 87 less CPE and IW	($42,832)
CL Rev Adj for Exo Changes	$8,049,472
Prem MOU	186,034,212
Non-Prem MOU	12,844,050
Total MOU	198,878,262
Stim MOU: SLC	21,440,878
Stim MOU: Exo	15,684,711
Stim MOU: Total	32,769,169
Stim MOU: Total @ 90	58,516,720
Total MOU Adj for Exo Changes	224,625,813
Subscriber Lines	116,063,662
CL/MOU Rate Adj for Exo Changes	$0.0358
CL/MOU Rate Unadj	$0.0514
CL/Loop Rate Adj for Exo Changes	$69.35
CL/Loop Rate Unadj	$88.00

Computation of Adjusted 6/85-5/86 Common Line/MOU Rate

6/85-5/86 Common Line	
Access Rev (CL)	$10,878,568
Net Return	$2,404,629
ANI	$18,387,193
FIT/SLIT	0.967797
ROR	13.08%
Net Return at 12%	$2,206,463
Earnings above 12%	$198,166
Revenue above 12%	$389,950
CL Rev at 12%	$10,488,618
Inside Wire	$1,627,434
IW ANI	$1,507,750
IW Excess Rev	$31,976
IW at 12%	$1,595,458
CPE	$921,415
CPE ANI	$1,167,587
CPE Excess Rev	$24,762
CPE at 12%	$896,653
CL less IW & CPE at 12%	$7,996,507

Computation of Adjusted 6/85-5/86 Common Line/MOU Rate

SPF Phase-Down	($586,093)	
SPF Phase-Down less CPE and IW	($446,836)	
Acct 645	$20,255	
Acct 645 less CPE and IW	$15,442	
High Cost Fund	$23,040	
WATS DA: 1986-7	($88,697)	WATS DA adjustment is calculated by assuming constant MOU/line and multiplying 7/86 - 6/87 WATS exogenous change by ratio of WATS closed-end MOU in current year to that of 7/86 - 6/87. The result is then multiplied by $103 / $149 to remove ISW included in the WATS exogenous change.
Reserve Def Amort	$137,137	
Tax Reform	($471,932)	
Tax Reform less CPE and IW	($359,800)	
COE Cat 3 - Dems	$42,683	
COE Cat 3 - Dems less CPE and IW	$32,541	
COE Cat 4 - Terms	$11,996	
COE Cat 4 - Terms less CPE and IW	$9,146	
Acct 662	($26,718)	
Acct 662 less CPE and IW	($20,370)	
Conformance	($95,687)	
Conformance less CPE and IW	($72,952)	
FASB 87	($49,261)	
FASB 87 less CPE and IW	($37,557)	
CL Rev Adj for Exo Changes	$7,141,522	

Computation of Adjusted 6/85-5/86 Common Line/MOU Rate

Prem MOU	179,382,372
Non-Prem MOU	20,564,460
Total MOU	199,946,832
WATS DA	24,541,446
Tot MOU less WATS DA	175,405,386
Stim MOU: SLC	12,533,370
Stim MOU: Exo	4,530,043
Stim MOU: Total	16,160,801
Stim MOU: Total @ 90	56,098,499
Total MOU Adj for Exo Changes	215,343,084
Subscriber Lines	113,316,244
CL/MOU Rate Adj for Exo Changes	$0.0332
CL/MOU Rate Unadj	$0.0544
CL/Loop Rate Adj for Exo Changes	$63.02
CL/Loop Rate Unadj	$96.00

Computation of Adjusted 6/84-5/85 Common Line/MCU Rate

6/84-5/85 Common Line	
Access Rev (CL)	$10,172,842
Net Return	$2,162,478
ANI	$18,510,144
FIT/SLIT	0.926620
ROR	11.68%
Net Return at 12%	$2,221,217
Earnings above 12%	($58,739)
Revenue above 12%	($113,168)
CL Rev at 12%	$10,286,010
Inside Wire	$1,846,371
IW ANI	$2,398,915
IW Excess Rev	($14,667)
IW at 12%	$1,861,038
CPE	$1,329,590
CPE ANI	$1,893,588
CPE Excess Rev	($11,577)
CPE at 12%	$1,341,167
CL less IW & CPE at 12%	$7,083,806

Computation of Adjusted 6/84-5/85 Common Line/MOU Rate

SPF Phase-Down	($701,460)	
SPF Phase-Down less CPE and IW	($483,084)	
Acct 645	$124,571	
Acct 645 less CPE and IW	$85,790	
High Cost Fund	$0	
WATS DA: 1986-7	($84,798)	WATS DA adjustment is calculated by assuming constant MOU/line and multiplying 7/86 - 6/87 WATS exogenous change by ratio of WATS closed-end MOU in current year to that of 7/86 - 6/87. The result is then multiplied by $103 / $149 to remove ISW included in the WATS exogenous change.
Reserve Def Amort	$137,137	
Tax Reform	($471,932)	
Tax Reform less CPE and IW	($325,012)	
COE Cat 3 - Dems	$42,683	
COE Cat 3 - Dems less CPE and IW	$29,395	
COE Cat 4 - Terms	$11,996	
COE Cat 4 - Terms less CPE and IW	$8,261	
Acct 662	($26,718)	
Acct 662 less CPE and IW	($18,400)	
Conformance	($95,687)	
Conformance less CPE and IW	($65,898)	
FASB 87	($49,261)	
FASB 87 less CPE and IW	($33,925)	
CL Rev Adj for Exo Changes	$6,333,273	

Computation of Adjusted 6/84-5/85 Common Line/MOU Rate

Prem MOU	159,296,057
Non-Prem MOU	24,306,300
Total MOU	183,602,357
WATS DA	23,462,547
Tot MOU less WATS DA	160,139,810
Stim MOU: SLC	6,493,672
Stim MOU: Exo	0
Stim MOU: Total	6,493,672
Stim MOU: Total @ 90	54,126,284
Total MOU Adj for Exo Changes	207,772,422
Subscriber Lines	109,965,483
CL/MOU Rate Adj for Exo Changes	$0.0305
CL/MOU Rate Unadj	$0.0554
CL/Loop Rate Adj for Exo Changes	$57.59
CL/Loop Rate Unadj	$92.51

Computation of Adjusted 1990 Traffic Sensitive/MOU Rate

1990 As Ordered
Traffic Sensitive-Switched

Access Rev (TS-SW)	$8,587,353	As reported
Net Return	$1,559,189	As reported
ANI	$13,000,093	As reported
FIT/SLIT	0.600616	As reported
ROR	11.99%	Net Return / ANI
Net Return at 12%	$1,560,011	12% * ANI
Earnings above 12%	($822)	Net Return at 12% - Net Return
Revenue above 12%	($1,316)	(1 + FIT/SLIT) * Earnings above 12%
TS-SW Rev at 12%	$8,588,669	Access Rev (CL) - Revenue above 12%
Equal Access	$235,313	As reported
EA Excess Rev	$0	See page 19 of this chart
EA at 12%	$235,313	Equal Access - EA Excess Rev
TS-SW less EA at 12%	$8,353,356	TS-SW Rev at 12% - EA at 12%
Prem MOU	321,083,177	As reported
Non-Prem MOU	6,814,082	As reported
Total MOU	327,897,259	Prem MOU + Non-Prem MOU
Stim MOU: SLC	6,327,658	As reported
Stim MOU: Exo	5,008,300	As reported
Stim MOU: Total	9,285,181	As reported
Total MOU Adj for Exo Changes	327,897,259	No adjustment made; Total MOU reflects 1990 stimulation
TS-SW Rate Adj for Exo Changes	$0.0255	TS-SW less EA / Total MOU Adj
TS-SW Rate Unadj for Exo Changes	$0.0262	Access Rev (TS-SW) / Total MOU

Computation of Adjusted 1989 Traffic Sensitive/MOU Rate

1989 Actuals
Traffic Sensitive-Switched

Access Rev (TS-SW)	$8,663,331
Net Return	$1,691,423
ANI	$13,294,262
FIT/SLIT	0.601947
ROR	12.72%
Net Return at 12%	$1,595,311
Earnings above 12%	$96,112
Revenue above 12%	$153,966
TS-SW Rev at 12%	$8,509,365
Equal Access	$247,757
EA Excess Rev	$0
EA at 12%	$247,757
TS-SW less EA at 12%	$8,261,608
SPF Phase-Down	($3,143)
Tax Reform	$47,181
Tax Reform less EA	$45,807
COE Cat 3 - Dems	($302,634)
TS-SW Rev Adj for Exo Changes	$8,001,639

All exogenous changes are cumulated for all later years. Thus the effect in 1989 is the amount reported for 1990. The effect in 1988 will be the sum of the 1990 and 1989 amounts, and so on. This adjusts exogenous changes to 1990 levels.

Only the Tax Reform Act exogenous change must be recast to remove the portion of the exogenous change reflected in the EA category.

Computation of Adjusted 1989 Traffic Sensitive/MOU Rate

Prem MOU	289,764,442	
Non-Prem MOU	7,794,881	Total exogenous stimulation in each yea
Total MOU	297,559,323	prior to 1990 is recast to the 1990
Stim MOU: SLC	6,979,203	level by multiplying the ratio of total
Stim MOU: Exo	5,120,899	1990 Stim Mou to 1990 Total MOU
Stim MOU: Total	10,571,560	less total 1990 Stim MOU, by the
Stim MOU: Total @ 90	8,363,567	year's Total MOU less total Stim MOU.
Total MOU Adj for Exo Changes	295,351,330	
TS-SW Rate Adj for Exo Changes	$0.0271	
TS-SW Rate Unadj for Exo Changes	$0.0291	

Computation of Adjusted 1988 Traffic Sensitive/MOU Rate

1988 Traffic Sensitive-Switched	
Access Rev (TS-SW)	$8,231,744
Net Return	$1,722,997
ANI	$12,825,399
FIT/SLIT	0.607716
ROR	13.43%
Net Return at 12%	$1,539,048
Earnings above 12%	$183,949
Revenue above 12%	$295,738
TS-SW Rev at 12%	$7,936,006
Equal Access	$255,242
EA Excess Rev	$0
EA at 12%	$255,242
TS-SW less EA at 12%	$7,680,764
SPF Phase-Down	($5,281)
Reserve Def Amort	$14,964
Tax Reform	$47,181
Tax Reform less EA	$45,664
COE Cat 3 - Dems	($508,165)
COE Cat 4 - Terms	$7,301
Acct 662	($5,694)
TS-SW Rev Adj for Exo Changes	$7,229,553

Computation of Adjusted 1988 Traffic Sensitive/MOU Rate

Prem MOU	258,269,102
Non-Prem MOU	8,452,116
Total MOU	266,721,218
Stim MOU: SLC	6,765,907
Stim MOU: Exo	5,105,113
Stim MOU: Total	10,223,676
Stim MOU: Total @ 90	7,475,003
Total MOU Adj for Exo Changes	263,972,545
TS-SW Rate Adj for Exo Changes	$0.0274
TS-SW Rate Unadj	$0.0309

Computation of Adjusted 7/86-6/87 Traffic Sensitive/MOU Rate

7/86-6/87 Traffic Sensitive-Switched		
Access Rev (TS-SW)	$7,102,456	
Net Return	$1,517,112	
ANI	$11,662,549	
FIT/SLIT	0.867188	
ROR	13.01%	
Net Return at 12%	$1,399,506	
Earnings above 12%	$117,606	
Revenue above 12%	$219,593	
TS-SW Rev at 12%	$6,882,863	
Equal Access	$220,924	Equal Access revenue is reported at the authorized rate of return. For this year, an average ROR of 12.375 was assumed. The adjustment is computed by multiplying EA ANI/EA Revenue by 0.375% by reported Equal Access. See 1989 TRP, COS-1(P) for EA ANI/EA Rev
EA Adjust to 12%	($2,100)	
EA at 12%	$218,824	
TS-SW less EA at 12%	$6,664,039	
SPF Phase-Down	($8,328)	
Reserve Def Amort	$49,763	
Tax Reform	($303,494)	
Tax Reform less EA	($293,845)	
COE Cat 3 - Dems	($625,862)	
COE Cat 4 - Terms	$9,562	
Acct 662	($20,881)	
Conformance	$393,380	
FASB 87	($38,082)	
TS-SW Rev Adj for Exo Changes	$6,129,746	

Computation of Adjusted 7/86-6/87 Traffic Sensitive/MOU Rate

Prem MOU	213,555,674
Non-Prem MOU	13,332,499
Total MOU	226,888,173
Stim MOU: SLC	5,317,735
Stim MOU: Exo	3,890,099
Stim MOU: Total	8,127,360
Stim MOU: Total @ 90	6,375,257
Total MOU Adj for Exo Changes	225,136,070
TS-SW Rate Adj for Exo Changes	$0.0272
TS-SW Rate Unadj	$0.0313

Computation of Adjusted 6/85-5/86 Traffic Sensitive/MOU Rate

6/85-5/86 Traffic Sensitive-Switched		
Access Rev (TS-SW)	$6,562,000	
Net Return	$1,331,020	
ANI	$10,699,691	
FIT/SLIT	0.967797	
ROR	12.44%	
Net Return at 12%	$1,283,963	
Earnings above 12%	$47,057	
Revenue above 12%	$92,599	
TS-SW Rev at 12%	$6,469,401	
Equal Access	$86,737	
EA Adjust to 12%	($1,649)	For this year, ROR was set at 12%. The adjustment was made as on page 15 of this chart, with the factor 0.75% instead of 0.375%.
EA at 12%	$85,088	
TS-SW less EA at 12%	$6,384,313	
SPF Phase-Down	($10,369)	
Acct 645	($37,234)	
WATS DA: 1986-7	($225,599)	WATS DA adjustment is calculated by assuming constant MOU/line and multiplying 7/86 - 6/87 WATS exogenous change by ratio of WATS closed-end MOU in current year to that of 7/86 - 6/87.
Reserve Def Amort	$98,296	
Tax Reform	($327,047)	
Tax Reform less EA	($322,746)	
COE Cat 3 - Dems	($625,862)	
COE Cat 4 - Terms	$9,562	
Acct 662	($20,881)	
Conformance	$393,380	
FASB 87	($38,082)	
TS-SW Rev Adj for Exo Changes	$5,604,779	

Computation of Adjusted 6/85-5/86 Traffic Sensitive/MOU Rate

Prem MOU	178,986,662
Non-Prem MOU	20,500,443
Total MOU	199,487,105
Stim MOU: SLC	3,098,841
Stim MOU: Exo	1,120,040
Stim MOU: Total	3,995,713
Stim MOU: Total @ 90	5,697,125
Total MOU Adj for Exo Changes	201,188,517
TS-SW Rate Adj for Exo Changes	$0.0279
TS-SW Rate Unadj	$0.0329

Computation of Adjusted 6/84-5/85 Traffic Sensitive/MOU Rate

	6/84-5/85 Traffic Sensitive-Switched	
Access Rev (TS-SW)	$5,587,443	
Net Return	$1,137,574	
ANI	$9,379,928	
FIT/SLIT	0.927645	
ROR	12.13%	
Net Return at 12%	$1,125,591	
Earnings above 12%	$11,983	
Revenue above 12%	$23,098	
TS-SW Rev at 12%	$5,564,345	
Equal Access	$46,856	
EA Adjust to 12%	($891)	
EA at 12%	$45,965	
TS-SW less EA at 12%	$5,518,380	
SPF Phase-Down	($12,410)	
Acct 645	($228,992)	
WATS DA: 1986-7	($215,681)	WATS DA adjustment is calculated by assuming constant MOU/line and multiplying 7/86 - 6/87 WATS exogenous change by ratio of WATS closed-end MOU in current year to that of 7/86 - 6/87.
Reserve Def Amort	$98,296	
Tax Reform	($327,047)	
Tax Reform less EA	($324,345)	
COE Cat 3 - Dems	($625,862)	
COE Cat 4 - Terms	$9,562	
Acct 662	($20,881)	
Conformance	$393,380	
FASB 87	($38,082)	
TS-SW Rev Adj for Exo Changes	$4,553,364	

Computation of Adjusted 6/84-5/85 Traffic Sensitive/MOU Rate

Prem MOU	158,815,341
Non-Prem MOU	24,293,020
Total MOU	183,108,361
Stim MOU: SLC	1,614,205
Stim MOU: Exo	0
Stim MOU: Total	1,614,205
Stim MOU: Total @ 90	5,289,210
Total MOU Adj for Exo Changes	186,783,366
TS-SW Rate Adj for Exo Changes	$0.0244
TS-SW Rate Unadj	$0.0305

APPENDIX D

The Long Term View of the Appropriate Productivity Factor For Interstate Exchange Access

by Thomas C. Spavins[1]

1. The Supplemental Notice in this proceeding presented a long term study of the productivity of the local exchange industry.[2] The study also outlined the relationship between the productivity of the local exchange telephone companies as a whole and the productivity of interstate access. This document revisits the analysis presented in that study. Explicit numerical estimates of the appropriate interstate productivity factor are presented under a number of alternative assumptions. This document also responds to comments on the initial study.

The Long Term Total Company View of Telephone Productivity

2. The approach taken in Appendix D of the Supplemental Notice estimated the price performance of the local telephone companies over the long term.[3] The starting point for this analysis was a conceptual model of the local exchange industry. This model viewed local telephone companies as providers of an essentially homogenous commodity, exchange access and transport, which is divided for historical legal and political reasons into federal and state jurisdictional portions. This model, when combined with an understanding of the separations process, provided a method of estimating the price performance of the local carrier's interstate access business. The next step in the analysis was to derive a long term estimate of the indirect total factor

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1 Assistant Bureau Chief For Economics, Common Carrier Bureau, Federal Communications Commission.

2 Supplemental Notice, 5 FCC Rcd at 2414 (Appendix D).

3 The study focused on the rate of change of the long term inflation adjusted price of telephone service. This number, under specified assumptions, is equal to the difference between the total factor productivity of the telephone industry and that of the economy as a whole. See Second Further Notice, 4 FCC Rcd at 2990 (para. 223). Supplemental Notice, 5 FCC Rcd at 2213 (para. 70) This estimate of differential total factor productivity is indirectly derived from price data, rather than directly estimated from data on inputs and outputs. In Appendix D and elsewhere this estimate has therefore been called an indirect productivity estimate.

productivity of the local companies. This section restates, with no essential changes, those results.

3. The basic view of the stylized facts of the local exchange industry was not new to the study published with the Supplemental Notice. The growth of competition and the AT&T divestiture spawned a number of careful economic studies of the economics of the local exchange.[4] A common theme of this literature was the relative homogeneity of local usage, despite the different names assigned to different uses of the local network (e.g., local, intra-LATA toll, interstate access and intrastate access). The large role of fixed costs, which are substantially independent of use, was a key point in the analyses.[5] This consensus stressed that local carrier revenue requirements, and therefore any measure of price performance for interstate access, were the result of both the economic costs of production and the separations rules used to recover these costs. This premise of the study presented in Appendix D of the Supplemental Notice drew no critical comment.

4. The next step in the analysis was to explore the implications of the separations process. The study observed that if the costs of local exchange were divided on a relative use basis then improvements in local carrier productivity would be shared between the the two jurisdictions. If costs were divided in fixed porportions and were collected from customers in the same way, prices in both jurisdictions would reflect equally any improvements in price performance. However, if some costs were divided in fixed proportions but recovered on the basis of use, then the jurisdiction with a more rapid rate of growth would appear more productive. The study observed that with respect to the local telephone industry of the 1990's, special access and traffic sensitive costs are divided between the jurisdictions on a relative use basis, while non-traffic sensitive costs are divided between the jurisdictions on approximately a fixed proportions basis but recovered in part

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4 See R. Park & B. Mitchell, Optimal Peak-Load Pricing for Local Telephone Calls (June 1986)(Rand Corporation, No. M. R-3404-RC); B. Mitchell, Incremental Capital Costs of Telephone Access and Use (August 1989)(Rand Corporation, No. R-3762-ICTF); R. Park & B. Mitchell, Local Telephone Pricing and Universal Service (June 1989)(Rand Corporation, No. R-3724-NSF); R. Shin, Econometric Estimation of Telephone Costs for Local Exchange Companies: Implications for Economies of Scale and Scope and Regulatory Policy (1988)(University of California); G. Brock, Telephone Pricing to Promote Universal Service and Economic Freedom (January 1986)(Federal Communications Commission). These papers contain extensive bibliographies.

5 For example, there is a debate as to the efficiency of local usage pricing given that most of the usage sensitive costs are caused by the provision of peak hour capacity rather than actual daily use.

on a usage basis.[6] The jurisdiction with the faster rate of growth (interstate) would appear to have a higher productivity with respect to these latter costs.[7] This analysis received no unfavorable comments. USTA provided a mathematical exposition of the general problem of measuring "productivity" when costs are not recovered in the same way they are caused.[8]

5. The study in Appendix D of the Supplemental Notice also observed that the post-divestiture time period was marked by a number of important shifts in the jurisdictional recovery of costs, and other factors which made it desirable to use estimates from both jurisdictions and a longer time period as a check of possible error. A number of important recent changes were identified. The comments on the Supplemental Notice disagreed with neither the desirability of a check or the list of important changes.[9]

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6 See 47 C.F.R. §§ 36.2 and 36. 154.

7 The assumption that the output of the unified entity is homogeneous is important to this analysis. Even if costs were divided in such a way that the rate of productivity growth were the same for each type of cost, if these rates were not all equal to each other, and the proportions of each type of output differed across jurisdictions, then another source of difference in productivity could arise. Casual inspection of the relevant data shows that the differences in the proportion of costs assigned to traffic sensitive and private lines does not, in the aggregrate, differ much between the jurisdictions, so a failure of the homogenity assumption would not appear to matter much. A very useful description of the technology of local access and transport is contained in Notes on the BOC Intra-LATA Networks (1983)(AT&T). See also J. Martin Telecommunications and the Computer (Prentice-Hall 1990).

8 See USTA Supplemental Reply, Attachment A. While AT&T's experts indicated general conceptual agreement with this approach to jurisdictional reconciliation, FCC staff and AT&T's experts did not reach closure on all points of interpretation, or on the magnitudes of the applicable parameters. Ex Parte Presentation June 28, 1990, referenced in letter of June 28, 1990 from Agnes Casnman, of AT&T, to Donna Searcy, Secretary, FCC.

9 Some parties argued that while a long time series with a large number of observations is inherently desirable, the 60-year length of the study includes data that are obsolete and hence of questionable relevance. AT&T Supplemental Comments, Appendix E at 4; see also Ad Hoc Supplemental Comments at 10. However, the study released in Appendix D of the Supplemental Notice identifies (using independent historical sources) major factors that affected telecommunications productivity. After statistically adjusting for the identified factors to determine if there were any unexplained divergence from long term patterns in recent years, there were none. This result supports the view that a long term study is relevant to today's interexchange access

6. The next step in the analysis of the productivity of the local carriers was to estimate the price performance or indirect total factor productivity of the local carriers. The study then used data from the Bureau of Labor Statistics to indirectly estimate the productivity of the telephone industry as a whole.[10] It was necessary to estimate productivity indirectly as the authors of the study did not have access to the data necessary to do a direct study.[11] NYNEX, in its Supplemental Comments, demonstrates the

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market. In addition, some parties identified a pattern of autocorrelation in Models 1 and 2 of Appendix D. See e.g., Ad Hoc Supplemental Comments at 12 and Appendix A at 8. However, the autocorrelation identified does not change the sign or value of relevant parameters. See USTA Supplemental Reply, Attachment A. Nevertheless, the revised study presented here reestimates Models 1 and 2 to correct for autocorrelation. These corrections do not change the principal results.

10 The data series used was the Consumer Price Index - All Urban Consumers (CPI-U) Telephone Services for 1936 to present, linked to a series on telephone and telegraph expenditures for 1930-1935. Criticisms of the use of this data series as overstating per line productivity fail to recognize that prices indicated in this series contain many usage based services. See AT&T Supplemental Comments, Appendix E at 2, 7-9. More fundamentally, the composite BLS series includes services such as historical long distance calling whose price declined faster than other telephone services, as well as services such as the provision of inside wire and customer premises equipement (CPE) that may not have been subject to as rapid a decline in per unit price. Baumol and Wolff are quite correct that a more disaggregated approach is desirable. We differ in the path we take to refine the data. They seek to identify exchange access with the old toll service. This view does not take into consideration that the old toll service included varying amounts of contribution toward local exchange costs. The Commission's purpose in this proceeding is to establish correct pricing incentives given a predetermined set of separations rules. Therefore, the approach herein takes these rules as given and "builds up" a productivity estimate. This is not to say that as an economic matter, the existing rules represent the definitive lodestone of access costs, rather; as an administrative matter, they are to be taken as given for the purpose of this proceeding.

11 Direct productivity studies measure a company's inputs and outputs to determine productivity. Indirect studies draw on price changes, since the prices companies charge directly reflects their performance. Several parties have challenged the use of indirect price studies as measures of productivity. See NASUCA Supplemental Comments, Attachment 1 at 13; Ad Hoc Supplemental Comments, Attachment A at 3; DSPSC Supplemental Reply at 3-5; CSE Supplemental Comments at 5. These comments suggested that an indirect study of productivity must hold profits constant. These criticisms are correct, and

high degree of comparability betweeen the indirect estimates of local carrier productivity and the direct estimates, for the time periods all three series are available.[12]

7. The series on local carrier productivity shows much variation over time, as the real (e.g., inflation-adjusted) price of telephone service has declined over time. The data also shows much year-to-year variation. The next step was to see if any changes could be discerned in the pattern of carrier productivity over time. Three regression models were estimated, and the residuals or unexplained variation in the data were displayed. The data demonstrated that while the rate-of-inflation did affect measured telephone price performance, the trend of adjusted telephone prices appeared to be constant.[13] This was consistent with the observations of a number of other

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explain why Appendix D did not rely on unadjusted price data. Indeed, the study performed a statistical analysis to ensure that this source of error did not bias the result. As indicated in the original study, there was a statistically significant association between the relative market-to-book ratio of AT&T's common stock, and the gap between cumulative price performance and the long term trend. This indicates that changes in profits had been a reason for the apparent departures of "productivity" from the long term trend. Furthermore, those criticizing the study did not offer alternative analyses or estimates of the magnitude of error. Finally, as indicated in Appendix D, telephone companies' earnings in this time period did not always exceed their cost of capital, as NASUCA suggests.

12 NYNEX Supplemental Comments, Attachment B at Chart 1. The correlations between the Appendix D Study, AT&T, and Christensen estimates are substantial (.591 and .606) and statistically significant.

13 NASUCA argues that the conclusion that a single trend in productivity has prevailed over the last 60 years stands in contrast to the results of every other study that attempts to detect changes in productivity trends over estended time periods. According to NASUCA, the body of evidence overwhelmingly supports the proposition that the telecommunications industry has experienced more rapid progress in productivity in later periods than in earlier periods. NASUCA Supplemental Comments, Attachment 1 at 12. None of the studies cited by NASUCA attempt to determine if there was a constant trend after adjusting for inflation and other variables. The studies are mere compilations of raw productivities, about which there is no question that they vary from year to year. The studies are also generally not studies of productivity differentials but of the absolute change in total factor productivity. The innovation that is of concern here is not scientific discovery per se, but the actual deployment and use of new technologies in the telephone network. Those changes are usually embedded in long lived telephone plant, which is replaced at a periodic rate. This is consistent with most models of the diffusion of innovation.

observers of the local telephone industry.[14] The equations show that adjusted for the impact of inflation, the long term trend in observed telephone company price performance showed a constant rate of improvement of 1.7-2.0 percent. These equations are reproduced in Table I. Chart I shows the historical price performance series. Chart II shows the difference between the actual and estimated real telephone prices. While the productivity estimates of the long term studies were not greeted enthusiatically by all, no party denied that inflation matters for the price performance of the telephone companies, nor did anyone even attempt to provide a productivity series which was explicity adjusted for the effects of inflation.[15]

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14 The impact of inflation and regulation on the economic fortunes of the telephone companies is no mere statistical artifact. Rather, it is one of the most salient features of the economic history of the industry. See J. Brooks, Telephone: The First Hundred Years, 189, 213-214, 227, 238, 243, 281-284, 296-297, (Harper & Row 1976); P. MacAvoy, The Regulated Industries and the Economy, 59-80, (Norton 1979); and the papers cited in T. Spavins, An Introduction to the Economics of Price Cap Regulation (1990)(Federal Communications Commission). J. Pierce & A. Noll, Signals: The Science of Telecommunications (W.H. Freemen & Co. 1990) provides a nice review of the long term evolution of telecommunications technology.

15 The ETI Report argues that statistical tests performed on the data demonstrate a significant trend difference for 1935-1961 and 1962-1989. Ad Hoc Supplemental Comments, Attachment A at 3-4. The data show no such breakpoint after adjustment for the effect of inflation and other variables. See Charts I and II. Ad Hoc's review of Appendix D is puzzling in other ways. For example, it asserts that Model 3 contained in Appendix D appears to add variables in a "random and undocumented manner" even though the text of Appendix D provides an explanation of the Model's specification, an explanation of the included variables, and references to a prior public document on the topic of telephone prices.

Table I

Model 1

1930-1989; -1.7% regression line trend; with autocorrelation correction

Regression Output:

R Squared	.70647
Std Error of Y est	.02164
Von-Neuman Ratio	1.96487

	constant	dCPI	d2CPI
X Coefficients	0.02780	-0.71879	-0.23464
Std Error	0.00515	0.08519	0.08490
t	5.394	-8.437	-2.763

Model 2

1946-1989; -2.0% regression trend line; with autocorrelation correction

Regression Output:

R Squared	.63245
Std Error of Y est	.02276
Von-Neuman Ratio	1.95664

	constant	dCPI	d2CPI
X Coefficient	0.03209	-0.70221	-0.29325
Std Error	0.00772	0.12737	0.11744
t	4.157	-5.512	-2.496

Model 3

1930-1989; multivariate analysis

Regression Output: R Squared .745

	constant	CPI	Yield	GNP	Traffic
X Coefficient	0.014	0.714	0.180	-0.135	-0.222
t stat	4.313	9.020	4.095	2.313	3.696

The Interstate Productivity Factor

8. The task before the Commission is to establish an interstate price performance target for local exchange carriers for the years beginning in

1991. An adjustment to the total company long term estimate should be made.[16] If the rate of growth of interstate use is greater than that of intrastate use, the interstate jurisdiction will appear to be more productive depending upon the difference in the rates of growth and the proportion of costs which are caused by lines but recovered by use.

9. An estimate of the difference between the expected growth of interstate use and intrastate use during the appropriate time period is also required. Data on the historical rate of growth of intrastate minutes is available from Common Carrier Statistics for 1980 - 1988,[17] and both the Tariff Review Plan and Common Carrier Statistics provides data on the rate of growth of interstate access minutes. The long term trend in intrastate use was about 3.2 percent.[18] Estimating the long term trend in interstate toll calling is somewhat more complex. Total interstate switched use grew at a rate of about 9.65 percent over the period 1980-1991.[19] This growth includes the large volume of traffic stimulated by the subscriber line charge program, the deregulation of customer premise equipment and inside wire, and various separations reforms. An accurate measure of growth in total interstate switched demand therefore requires removal of stimulated minutes. This requires use of estimation techniques on which economists may differ. The author's single value estimate of the amount by which 1990-1991 quantities would be reduced if regulators tried to tax interstate switched access for the full amount of the separations reform and subscriber line charge program is about 85-90 billion access minutes.[20] This volume of stimulation would reduce

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16 The comment by Baumol-Wolff on the need to adjust the raw number is quite correct. AT&T Supplemental Comments, Appendix E at 3-4. As observed in Appendix D to the Supplemental Notice "If ... the rate of growth of interstate traffic were greater ... interstate should appear to be more productive".

17 Statistics of Communications Common Carriers, 307, (1988/1989 Edition)(Federal Communications Commission).

18 This is the simple 1980-1988 compound rate of growth of the sum of local use and state toll calling. See Statistics of Communications Common Carriers, 307, (1988/1989 Edition)(Federal Communications Commission).

19 This growth rate was computed over an 11.5 year period (1/1980-7/1991). Interstate toll calling for 1980 is shown at Statistics of Common Carriers, 307, (1988/1989 Edition)(Federal Communications Commission). Traffic for 7/90-7/91 is the estimated volume of traffic sensitive access minutes. This was used to provide a series that is consistent given the removal of closed end WATS lines from payment of NTS charges in 1986.

20 The key parameters of the estimate are: initial quantity of 327 billion access minutes, a price of a two ended call-minute of about $.21, a traffic

the trend rate of growth to 6.43 percent. To be conservative either because of an overestimate of demand stimulation or other factors,[21] this study will also estimate the interstate price performance target under the assumption of 8 percent rate of growth. Thus, the difference between the two interstate rates of growth and the 3.2 percent intrastate rate of growth is between 3.23 percent and 4.8 percent. The difference between the interstate and intrastate rates of growth is this percent difference multiplied by the proportion of interstate costs that are non-traffic sensitive but are recovered by use.[22] If interstate costs are 25 percent of the total, then interstate productivity should be .53 or.79 above intrastate. Therefore, the adjustment of the average productivity required to derive interstate productivity is .4 to .6.

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sensitive marginal cost of $.01, an elasticity of demand of -0.7, and about $10.5 billion in net shift of revenues. The parameters are all at or near values generally used in this record. See Ex Parte Letter dated August 16, 1990 from Agnes Cashman, of AT&T, to Donna Searcy, Secretary, FCC.

21 For example, the long distance industry may not have been in a sustainable equilibrium in 1980, and might have experienced reduced growth, but for the access charge reform program.

22 The expected average of this amount is 16.4 percent, based on the most recent tariff review plan for the eight largest companies.

Table II

The Interstate Productivity Target

Factor	Low	High	Best Estimate
Total Productivity	1.7	2.0	1.85
Interstate Adjustment	.4	.6	.4
Total	2.1	2.6	2.25[23]

Productivity Targets for Different Formulas

10. The task of reconciling the long term studies of telephone productivity with a productivity factor to be used in a system of price caps for interstate access requires an additional adjustment. The price cap system will not use a simple price index that weights each year's prices by recent quantities. Rather, the price cap formula will use a slightly different formula which attempts to weight in equal proportions the per line and per minute recovery of non-traffic sensitive costs. This study calculates an interstate productivity offset on the assumption that non-traffic sensitive revenue requirement is capped on a per line basis. The per line measure, which weights per line recovery at 100 percent and per minute recovery at zero, provides a useful comparison to the short term study contained in Appendix C.

11. The table below calculates the adjusted interstate productivity target for a per line NTS index. The results are displayed for an assumed

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23 This estimate is almost equal to the estimate of National Economic Research Associates of the interstate productivity factor when it tried to reconcile the available data on total productivity with that for toll and interstate access. See USTA Supplemental Reply, Attachment A. This level of technical change is at the high end of the available estimates of total productivity for major sectors of the U.S. economy. An interstate productivity differential of 2.25, is the equivalent of a total productivity of almost 3.15 over the 1948-1979 period. None of the sectors surveyed in one major study were able to sustain a productivity that high for such a long period. For short periods, productivity growth rates this high were observed. See D. Jorgenson, F. Gollop, & B. Fraumeni, Productivity and U.S. Economic Growth, 17-19, (Harvard University Press 1987).

average rate of growth of 6.5 percent and 8.0 percent for each of three productivity estimates.

Table III

Productivity Targets for Different Formulas[24]

Productivity	Productivity Adjusted for the Per Line Formula
2.10	1.53
2.25	1.68
2.6	2.03

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24 The proposed Consumer Productivity Dividend will add .5 percent to each of the numbers presented in this table.

CHART 1

Actual and Predicted GNP

using published CPI 1945 - 1989

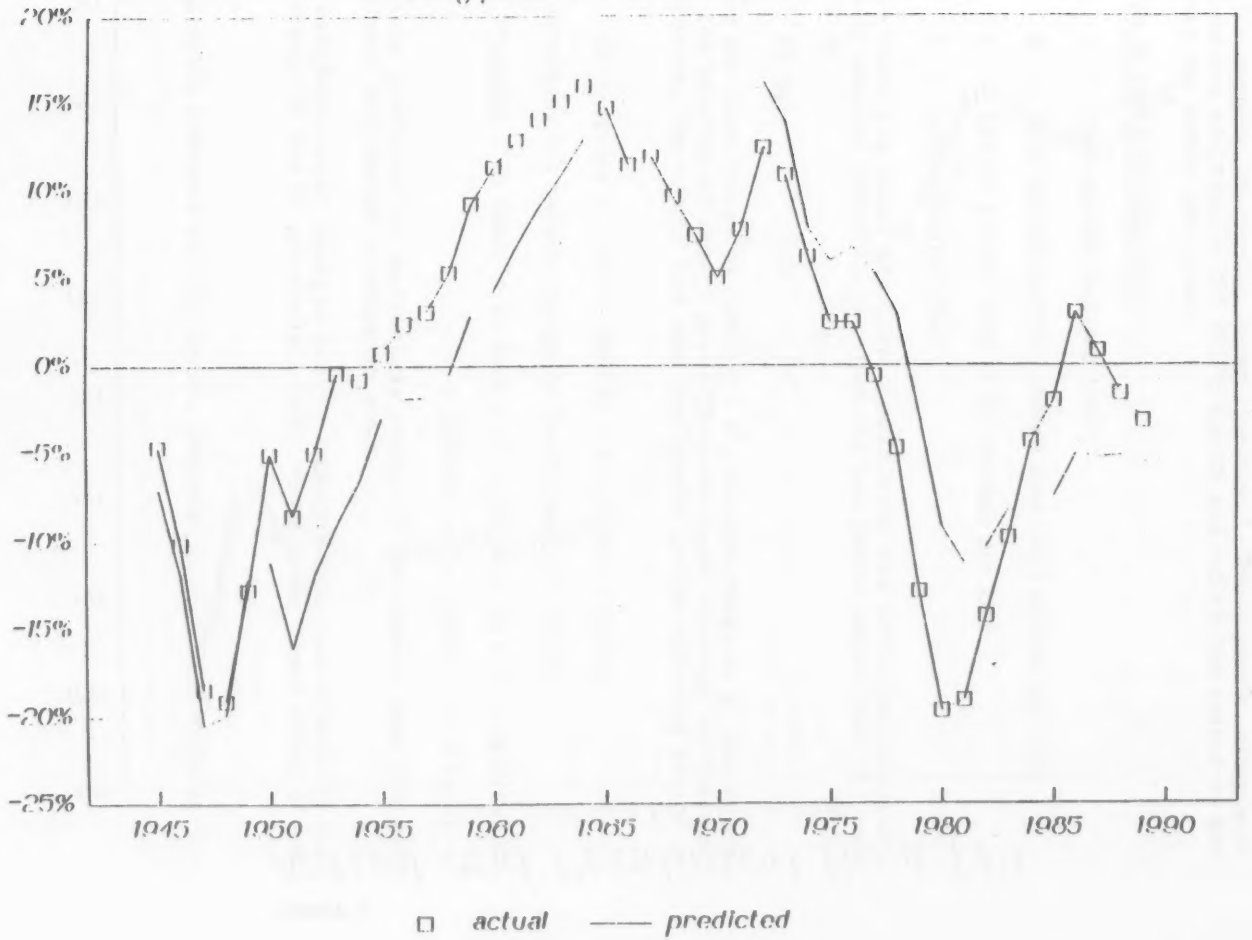

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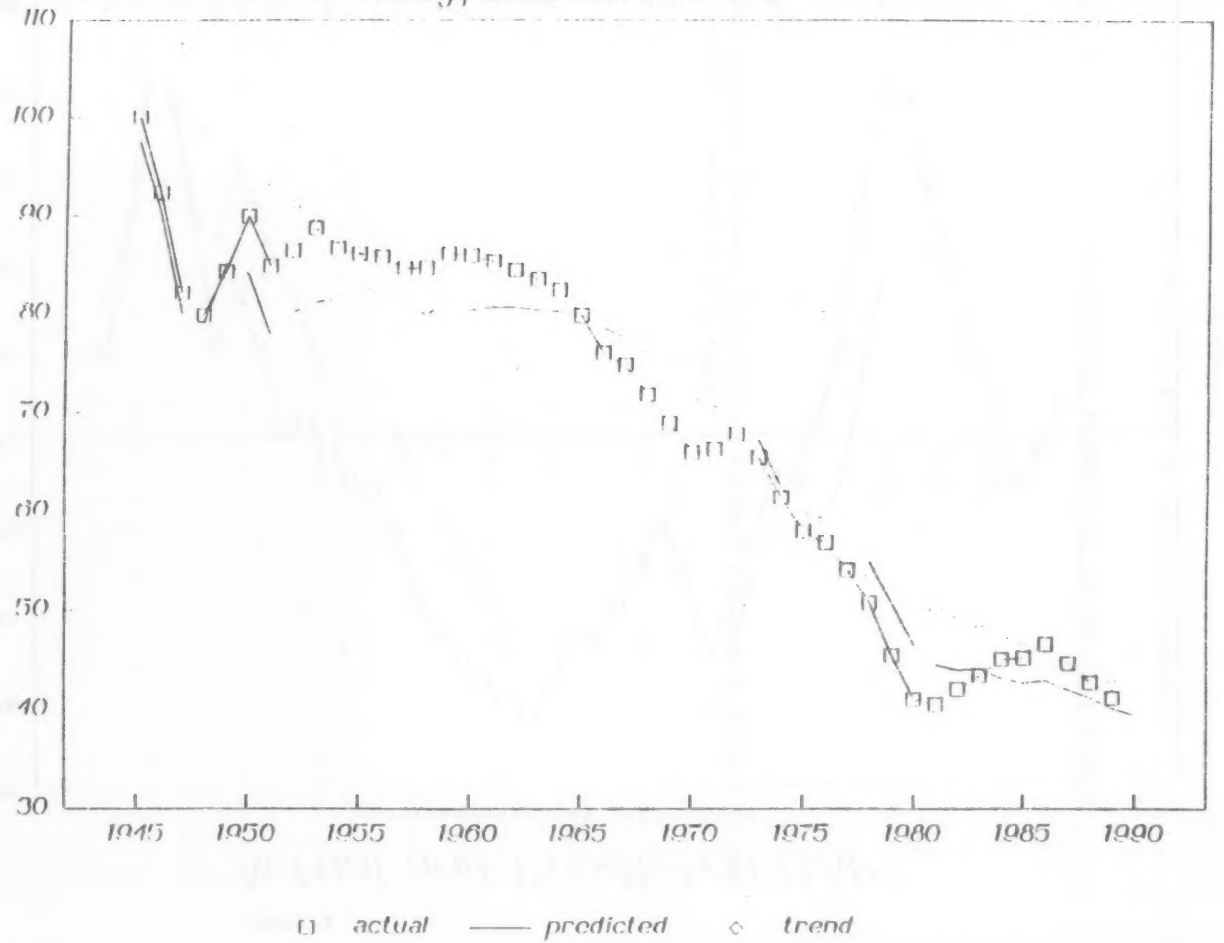
CHART 2

Actual and Predicted Real TPI

using published TPI 1945 - 1989



APPENDIX E

Technical Aspects of the Common Line Price Cap Index Formula

Several commenters expressed confusion and concern about the method proposed for capping the carrier common line rate.[1] This Appendix, along with the rules we are adopting in CFR §61.45 clarify and explain the method we are using to cap the common line basket.

Calculation of the Price Cap Index

Let C = base period cost per line

M = base period carrier common line (CCL) minutes per line

g = annual growth rate of CCL minutes per line

X = productivity offset

We assume that the costs per line change with the inflation-adjusted productivity measure (GNP-PI - X). Then the base period common line (CL) cost per minute is:

CL Base : C/M

Since costs per line change by "GNP-PI - X", minutes change by g, and we are splitting the benefits of demand growth between local exchange carriers and their customers, the common line cost per minute in the following period is given by:

CL Proposed : $[C(1 + GNP\text{-}PI - X)] / [M(1 + (g/2))]$

To determine the percent change in the CL cost per minute:

$$(CL\ Proposed - CL\ Base) / CL\ Base = ((1 + GNP\text{-}PI - X) / (1 + (g/2)) - 1$$

$$= (GNP\text{-}PI - X - (g/2)) / (1 + (g/2))$$

This formula provides the percentage change in the common line cost per minute, absent any changes in exogenous costs.

If exogenous cost changes occur, this will have two effects on the percent change in the CL per minute. First, there is the direct effect of the

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1 California Comments at 4-5; Centel Comments at 15; Hawaii Reply at 16-17.

exogenous cost, which is given by the term "ΔZ/R" in the PCI formula. Second, the change in exogenous costs will alter the base of costs to which the inflation-adjusted productivity measure is applied. Because costs are changing by ΔZ, the inflation-adjusted productivity measure is applied only to those costs which will be incurred in the coming period. These costs are:

$$R + \Delta Z$$

where

ΔZ = change in exogenous costs, and

R = the sum of existing CCL and SLC rates multiplied by base demand[2]

The new CL per minute rate is thus obtained by multiplying the existing Cl per minute rate by:

$$[1 + w((GNP\text{-}PI - X - (g/2)) / (1 + (g/2))) + \Delta Z/R]$$

where

$$w = (R + \Delta Z) / R$$

Calculation of the CCL Rate

Having obtained the change in the CL per minute rate allowed under the price cap, we must translate that change into a change in the carrier common line per minute rate. The method used to achieve this can perhaps best be understood by a review of the method used to develop CCL rates under rate of return regulation.

Under rate of return, carriers forecast total CL costs and total subscriber lines. Costs are then divided by lines to obtain a rate per subscriber line. The Subscriber Line Charge (SLC) the end user pays is the lesser of this computed rate or the maximum SLC allowed under the Commission's rules. The CCL rate is then set to recover any residual CL revenue requirement, which is the difference between the total CL costs and the sum of the SLCs multiplied by forecasted subscriber lines.

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2 Since the existing rates must in aggregate be set at or below the cap (which reflects costs) we do not need to use booked revenues for R in this formula. See United Supplemental Comments at 16-17.

Under price cap regulation, SLCs will be determined as they were under rate of return regulation. The CCL rates will then be determined to recover the residual CL costs using the following formula:

$$CCL_{MOU} = CL_{MOU} * (1 + \% \text{ change in CL PCI}) - SLC_{MOU} * 1 / (1 + (g/2))$$

where

CCL_{MOU} = proposed CCL rates multiplied by base period CCL minutes of use, divided by base period CCL minutes of use,

CL_{MOU} = existing CCL rate multiplied by base period CCL minutes of use plus existing SLC rates multiplied by base period lines, divided by base period CCL minutes of use, and

SLC_{MOU} = proposed SLC rates multiplied by base period lines.

Note that the SLC rates used to compute CL_{MOU} and SLC_{MOU} will not necessarily be the same. This is the case because they are fulfilling different functions in the two parts of the CCL equation. In the computation of CL_{MOU}, the SLCs reflect base period costs, and therefore the existing (i.e., base period) SLC should be used. These costs recoverd by SLCs, along with the costs recovered by existing (i.e., base period) CCL rates, are then allowed to change by the percent change in the CL PCI. In computing the SLC_{MOU}, the SLCs are the revenue per line which will be received. This revenue must be subtracted from the total CL costs to determine the costs which must be recovered by CCL charges.

Calculation of Upper and Lower Service Bands

Pactel requests that we clarify our methodology for computing the upper and lower bands on the Service Band Indexes (SBIs). It proposes the following formulas:

$$\text{Lower Band} = SBI(PY) * [PCI(t) / PCI(t-1) - 0.5]$$
$$\text{Upper Band} = SBI(PY) * [PCI(t) / PCI(t-1) + 0.5]$$

where SBI(PY) is the SBI value in effect at the end of the previous tariff year. While we are adopting no specific formulas for computing the upper and lower bands, we note that these formulas will compute the upper and lower bands as required by our rule.[3]

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3 See CFR §61.47(e).

APPENDIX F

Issues Affecting the January 1 and July 1, 1990 Price Cap Filings

As we have done under rate of return, we plan to standardize the tariff filing formats for price cap carriers. We therefore direct the Common Carrier Bureau to develop a standard tariff review plan for use in annual filings. For the purposes of the first price cap filing on January 1, 1991, we provide some guidance here of the methods we wish to be used. Additional guidance may be provided by the Bureau subsequent to the release of this Order. As in the annual filings effective July 1 of each year, we seek filing formats and methods that are as standardized as possible for the first set of price cap tariffs.

Price cap tariffs effective January 1, 1991 will be filed no later than November 1, 1990. Due to the simplified nature of the first filing, 60 days' notice should provide ample time for interested parties and Commission staff to review the proposed rates for adherence to our price cap rules.

Since the first price cap filing arrives in the middle of an annual tariff cycle that normally begins July 1 and ends the following June 30, the price cap annual adjustment mechanism (the price cap index) will not be calculated to reflect changes in inflation less the productivity offset. Accordingly, PCI levels filed November 1, 1990 should reflect the PCI initial value of 100 on July 1, 1990, adjusted only for exogenous cost factors detailed in the Order or specified in this appendix through January 1, 1991. Actual prices, filed November 1, 1991, as measured by the actual price index, must be at or below the PCI level.

In addition, because this first price cap filing is coming in the middle of a tariff year, upper and lower bands shall be set based on the July 1, 1990 service band index (SBI) levels, adjusted for changes in the PCI. If carriers have lowered rates since July 1, 1990 to a level that would take an SBI below its lower band, the lower band shall be set at the SBI. No further below band cost support will be required in such a case, because the cost support filed previously with the rate reduction will have shown that the rates cover their costs.

Treatment of Disallowances Revised Since July 1, 1990

On July 2, 1990, the Common Carrier Bureau revised the disallowances that were reflected in July 1, 1990 rates. These revisions resulted in changes

to the July 1, 1990 rates.[1] These revised disallowances, and any other subsequent revisions to disallowances, must be reflected as adjustments to Price Cap Indexes. Treatment of revised disallowances as adjustments to PCI levels is consistent with the Commission's decision to use July 1, 1990, rates as a starting point for price cap regulation. Selection of the July 1, 1990, date as the point indexes are initialized reflects the Commission's view that, for the purposes of starting caps, rates bear a reasonable relationship to costs. Subsequent decisions to alter our view of costs therefore requires adjustment to PCI levels. The methods that carriers use to calculate PCI adjustments for this purpose will be resolved by the Bureau.

Exogenous Costs Included in 7/1/90 Rates

The July 1, 1990 rates reflect the half year effect of certain exogenous changes that will be going into effect on January 1, 1991. These exogenous changes are changes in Subscriber Plan Factor (SPF) and changes in Dial Equipment Factor (DEM). In addition, the July 1, 1990 rates reflect the one quarter effect of other exogenous changes that will be going into effect on April 1, 1991. These are changes in transitional support. No further adjustment to the PCIs will be required on January 1, 1991 to reflect these changes. However, in the annual filing to be effective July 1, 1991, the PCIs must be adjusted to reflect the remainder of the January 1, 1991 exogenous effects and the half year and quarter year effects of the January 1, 1992 scheduled exogenous changes.

We require this adjustment to avoid excessive rate churn that would be associated with reflecting these exogenous changes in the PCI at the time they occur. Since these changes are scheduled to occur at certain times, we believe that the best way to "smooth" their impact on the PCI is to allow them to be reflected only yearly and at the time of the annual filing. We believe that this treatment will avoid excessive filings by carriers and is consistent with currently scheduled filings to account for these changes under rate of return. We recognize, of course, that this treatment is an exception to the rule that exogenous cost changes be reflected at the time they occur. See Appendix B, Rule 61.45(d)(2).

Rate of Return Represcription

Beginning January 1, 1991, carriers must reflect the 11.25 percent rate of return in both their price cap index levels and their rates. We delegate to the Common Carrier Bureau the authority to specify the mechanics of the flow through of the revised rate of return.

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1 See In the Matter of Annual 1990 Access Tariff Filings, CC Docket No. 90-320, 5 FCC Rcd 4142 (1990).

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